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showing the different castes, the sub castes and the number of
Included in th
which is the Va
appear 'Agarwala 33,966 then certain other sub castes and then the sub caste with which we are concerned, "Golwara 2,190 ' That is a clear recognition that the Golwaras are a sub caste of the Vaishya caste or Trading caste

[10] The other document to which their Lordships would refer is of a different character It is a paragraph dealing with Banias taken from the Statistical Descriptive and Historical account of the North Western Provinces of India, published in 1883 It is true that this paragraph deals with Banias and not with Vaishyas, but it seems clear to their Lordships that, although the two words may not always be used strictly in the same sense, yet in the paragraph under consideration, what the learned author is dealing with is in fact the Vaishya caste, whom he calls Banias In that paragraph he refers to the sub castes or classes of the Trading caste and included amongst them are again the sub castes with which their Lordships are concerned in this case namely, the Agarwalas and the Golwaras Those are two examples of the documentary evidence which supports the view put forward by the respondents

[11] As to the oral evidence very different views were taken by the Civil Judge and by the High Court upon its value The Civil Judge expressed himself thus

> A resume of the defendant s evidence on the point would pointedly show that the defendant s witnesses are far more respectable and men of means than those given by the plaintiffs and that the defendant s witnesses unanimously declare that under a custom prevalent in the 'baradri no Agarwala can marry outside the community

That sentence is not directed immediately to the point with which their Lordships are now concerned but the passage shows the view which the Civil Judge took of the testimony

[12] The High Court, on the other hand, thus expressed themselves

> On comparing the plaintiffs evidence with that of the defendant it will be found that the evidence of the defendant is very poor and unreliable The plaintiffs evidence receives full support from the documentary evidence whose authenticity cannot be disputed

[13] If their Lordships had to judge between the diverse opinions expressed by these Courts they would unhesitatingly decide in favour of the view expressed by the High Court, for upon the analysis of the evidence which has been made it appears to them that there is more weight to be attached to the evidence given on behalf of the plaintiffs than to that given on behalf of the defendant, but whatever view they might take upon that matter if there were no documentary evidence, it appears to them that the documentary evidence really clinches the matter and can leave them in no doubt that so far from the appellant displacing the presumption of the validity of this marriage, the evidence that has been given strongly supports that view

[14] Accordingly, their Lordships sustain the opinion expressed upon this matter by the High Court and will humbly advise His Majesty accordingly The appeal will be dismissed with costs

D S *Appeal dismissed*

Solicitors for Appellant — *Barrow Rogers & Nevill*
Solicitors for Respondents — *Douglas Grant & Dold*

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*[C N 47 ]*

## A. I R. (34) 1947 Privy Council 169

*(From Madras)*

**20th May 1947**

LORD THANKERTON, LORD DU PARCQ AND SIR JOHN BEAUMONT

*Suryanarayanamurthi — Appellant* v *Suramma and others — Respondents*

Privy Council Appeal No 97 of 1945

**Will — Testamentary capacity— Onus to prove**

It is for the party propounding a will to satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator and secondly that if a party writes or prepares a will under which he takes a benefit that is a circumstance that ought generally to excite the suspicion of the Court (1838) 2 Moore P C 480 (P C) *Ref* [Para 15]

(In this case his Lordship held that the first of these conditions was fulfilled and the testator had testamentary capacity at the time of making the will The second condition did not arise The fact that the ... his his able he or that he did not understand the dispositions which in fact he did make ) [Para 15]

*Case referred —*
1 (1838) 2 Moore P C 480 (P C) Barry v Butlin

*Noel Middleton and R K Handoo*— for Appellant
*Sir Herbert Cunliffe and P V Subba Row* — for Respondents

**Sir John Beaumont** — This is an appeal from a judgment and decree of the High Court of Judicature at Madras dated 26th August 1943, which reversed a judgment and decree of the Court of the Subordinate Judge at Amalapuram, dated 27th September 1940

[2] On 9th March 1938 respondent 5 as

pellant, defendant 2 On 19th February 1940 whilst the suit was pending, the father died,

leaving him surviving, his widow, respondent 1, his two sons, the appellant and respondent 5, and four daughters, respondents 2, 3, 4 and 6. The daughters were brought on record as the legal representatives along with the widow of the deceased.

[3] Four days before his death, namely, on 15th February 1940, defendant 1 (who will hereinafter be referred to as "the testator") made a will which, if valid, affects the shares in which the interest of the testator in the joint family property will be divisible between surviving members of the family. The appellant challenged the fact of the execution of the will and alleged, in the alternative, that the testator was not of testamentary capacity when he made his will. The Subordinate Judge raised an issue: "Whether the will set up by defendants 3 to 7 is true, valid and binding." In answer to the issue he held that the execution of the will was proved, but that it was not proved that the testator was in a sound disposing state of mind, and that the will was not valid and binding. In appeal the High Court agreed with the finding that the will was duly executed, but disagreed with the view of the lower Court as to the testamentary capacity of the testator, and made a declaration that the testator was in a sound disposing state of mind and that the will was valid and binding.

[4] The will was in the following terms:

"Will executed and given on 15th February 1940, by Venkatapati Somayajulu Garu's son Jabdatual Yakaran Sree Duvvuri Suryanarayana Somayajulu, Baphyat, Bashand Zamindar Garu, Brahmin, Zamindar, resident of Gangalakurru.

I am now about 65 years old. From the past about four years shivering and palpitation have set in in my body. Now, on account of a little paralysis, shivering of the hand has also set in. Apprehending as to what the future might be, I have made the following arrangements regarding the provisions to be given effect to after my lifetime in respect of all my movable and immovable properties.

I have two sons named Suryanarayanamurti and Venkatapati Somayajulu, four daughters named Garimella Seethamma, Akella Seshamma, Challa Kameswaramma and Garimella Annapurnamma and a wife named Suramma.

My son, Venkatapati Somayajulu filed the suit, O. S. No. 9 of 1938 on the file of the Sub-Court, Amalapur, against me and against my son, Suryanarayana, for partition of the family properties. In the said suit, my elder son and I filed (written) statement and are contesting the suit. Without prejudice to my contentions in the said suit, some lands have been put in my possession. For partition of the remaining lands and the movable properties, the suit is being adjourned for trial. While so, as the disease has been gradually growing in my body, I have thought that, in any event it would be good to make arrangements as hereunder and have executed this will making provisions as described hereunder.

That, out of my share of the immovable properties, my eldest daughter, Garimella Seethamma, shall get land of the extent of 4 acres, with life interest. the second daughter, Akella Seshamma, shall get land of the extent of 4 acres, the third daughter, Challa Kameswaramma, 2 acres of land and the fourth daughter, Garimella Annapurnamma, 6 acres of land; that afer my lifetime, my wife, Suramma, shall give the lands of her choice as aforesaid that, out of the said lands, the land that may be given to Garimella Seethamma, shall after Seethamma's lifetime, pass to my elder son, Suryanarayanamurti with full rights; that as regards the lands that are going to be given to the other three daughters, the same shall be enjoyed by them during their lifetime and that after their lifetime, the same shall pass to their male descendants with full rights; that as regards all the remaining immovable properties pertaining to my share, my wife shall enjoy the same during her lifetime and that, after my wife's lifetime, my second son, Venkatapati Somayajulu, shall enjoy the same with full rights, and that, out of the entire movable properties that might fall to my share in the suit, my wife shall, after discharging the debts due to outsiders for my share, deal with the entire remaining movable properties according to her pleasure. I have executed this will wholeheartedly and with sound consciousness agreeing that this will shall take effect after my lifetime, in the manner mentioned above. Nothing has been written previous to this will. It has been arranged that, as regards the house that has fallen to my share, my wife, Suramma, and my daughter, Garimella Seethamma, shall reside in the same during their lifetime and that, after their lifetime, the same shall pass to my second son, Venkatapati Somayajulu. I reserve to myself the right to cancel this will."

[5] The will was expressed to have been written by Akella Subbarayudu and to have been witnessed by three witnesses. It was registered on 17th February 1940, in the circumstances hereinafter mentioned, and the testator died as already mentioned on 19th February 1940.

[6] The will, it will be seen, makes provision for all the members of the testator's family but gives only a very small share to the elder son, the appellant. The elder daughter was a widow, and the provisions of the will are natural enough if the testator was on bad terms with his elder son. Upon this question, and also upon the question as to the state of the testator's health, the following passage in para. 3 of the written statement, filed by the testator as defendant 1 on 8th August 1938, is relevant.

"About two years ago, defendant 1 fell down from the cart, broke his hand and foot, and suffered much without being able to get up from the cot for some time. Subsequently also, a kind of tremor due to biliousness began and he is not in a condition to move out of the house. Ever since that time, because of old age, because of bodily illness and because of lack of steady mind, he was unable to manage the family property. As defendant 2 was the eldest son, ever since that time he assumed management of the family business, caused some lands to be cultivated, collected the coists, failed to give the said moneys to the family property and spent the same for bad purposes for himself. Moreover, having learnt about the filing of this suit, having learnt about the absence of this defendant from home, he beat his mother and sister in the family house on 10th March 1938, forced open the iron safe and carried away the documents, promissory notes, silver,

brass etc articles belonging to the family Not being able to bear the violent behaviour of defendant 2 and his friends this defendant and his wife went to Irusumanda village where they have been residing at the house of their son in law Defendant 2 has accordingly suppressed all the movable property belonging to the family

[7] Those allegations against the elder son may or may not be true they have not been proved but their importance is that they show the feelings which the testator entertained towards his elder son during the pendency of this suit

[8] The finding of the lower Courts as to the factum of the will has not been challenged There is no allegation of undue influence or fraud and the only question debated on this appeal is as to the testamentary capacity of the testator The contentions of the appellant are that the burden of proving testamentary capacity lies on those who propound the will that the admittedly bad state of health of the testator and the fact that he died four days after executing the will make the burden peculiarly heavy and that the Subordinate Judge having found as a fact that testamentary capacity was not proved the High Court was not justified in interfering Upon this latter point a consideration of the evidence and of the judgments of the lower Court makes it clear that the High Court did not differ from the Subordinate Judge in his appreciation of the witnesses whom he had seen the difference between the Courts lay in the weight which they respectively attached to different classes of evidence

[9] Apart from the members of the family whose evidence is not of much relevance and is not disinterested the evidence that the testator was of testamentary capacity rested on the testimony of the writer of the will, of two of the attesting witnesses and the Sub Registrar The third attesting witness was not available

[10] The writer of the will who was defence witness 2 deposed that he wrote the will and that the testator had no fever on that day His evidence is that on the morning of 15th February he was called by one of the testator s daughters (respondent 4) to the testator s house, and the testator asked him to write a will The witness suggested that somebody else should be procured for the purpose but the testator said that the witness could easily do it The witness says that he asked the testator why he was giving to his second and not to his elder son and the testator said his elder son had beaten his wife and was contracting many debts The testator told him the dispositions he wanted to make and the witness made notes of them and then wrote the draft at his own house and took it to the testator later in the day On the suggestion of the wife and respondent 4 the last sentence of the will as to the house was added to the draft The fair copy of the will was executed by the testator in the presence of the witness and the attesting witnesses The testator then said that the will must be registered and accordingly the witness went to the Sub Registrar on the next day the 16th and arranged that the Registrar should come to the testator s house on the morning of the 17th This was done and the will was then registered The witness says that the testator was not sick during those days but he got sick again on the 18th

[11] The evidence of the two attesting witnesses who were called is that the testator executed the will in their presence on 15th February and that he was then in a sound state of mind

[12] The evidence of the Sub Registrar who was defence witness 1 is of great importance He says that he went to the testator s house having been called by Subbarayudu and that he there registered the will on 17th February Before doing so he took the deposition of the testator which was Ex 9 (e) Original Ex 9 (b) That deposition is in these terms

> On 15th February 1940 I executed a will I have four daughters named (1) Garimella Seethamma (2) Akella Seshamma (3) Challa Kameswaramma and (4) Garimella Annapurnamma and two sons named (1) Suryanarayanamurti and (2) Venkatapati Somayajulu I have a wife also named Suramma In the will I have provided 4 acres to my first daughter 4 acres to my second daughter 2 acres to my third daughter 6 acres to my fourth daughter and the rest of the properties to be enjoyed by my wife during her lifetime The first daughter has life interest Thereafter that property should pass to the first son The other daughters should enjoy the properties with absolute rights As regards the properties given to my wife the same should after her lifetime pass to my second son I executed this will with consciousness Now I am suffering from rheumatism Therefore on account of the shivering of my hand I am unable to sign properly I have answered all these questions you have put I request for the registration of the will
>
> Now I am in full consciousness

[13] According to the witness this deposition was taken down in answer to questions addressed by him to the testator as to how many children he had what will he had executed, and why his hand was shaking The witness says that after taking the deposition he read out the will and it was admitted by the testator, and that the testator was in a sound disposing state of mind and he could understand what was being said and done

[14] If the writer of the will and the Sub Registrar are honest witnesses their testimony establishes that the testator himself dictated his wishes which were embodied in the will on 15th February and on the 17th he remembered it

contents and desired that it should be registered. In the face of such evidence it is difficult to challenge testamentary capacity. The Subordinate Judge did not say that he disbelieved either of these witnesses, nor did he suggest that they were not disinterested. Indeed, he accepted their evidence, and that of the attesting witnesses, as to the factum of the will. He considered that the Sub-Registrar was somewhat inexperienced, and regarded the words added to Ex. 9 (c): "Now I am in full consciousness" as indicating a doubt in the mind of the Sub-Registrar as to whether that was really the fact. The only criticism the learned Judge made about the writer of the will was that he had never written any document previously for the testator, and that it was strange that the testator did not consult his lawyers about the will. Their Lordships agree with the High Court in thinking that these criticisms afford no ground for disbelieving the witnesses. The Subordinate Judge also thought that the signature of the testator on the will was a mere scrawl, but the High Court thought that many of the letters were identifiable. As the original of the will has not been produced before the Board, their Lordships must accept the view of the High Court upon this matter. In any case, the testator's thumb impression was taken upon the will as well as his signature. The evidence on which the learned Subordinate Judge mainly relied for holding that testamentary capacity had not been proved was that of a country doctor, Rayavarapu Akkiraju, who was defence witness 10. He admittedly visited the testator on 18th and 19th February, when he found him in a state of stupor and sometimes delirious, and he considered that on those days the testator was not in a fit condition to execute any will. He says that he was told, though he does not remember by whom, that the testator had been ill for the past week and that the testator was in the condition of stupor and delirium for two or three days previously, and he thought that condition might have been in existence at least for a couple of days previously. The evidence of the doctor as to the condition of the testator on 18th and 19th February may be accepted, but he admitted in cross-examination that his opinion as to the condition of the testator before his visit was based on inference derived from the information which somebody had given him. Their Lordships agree with the High Court in thinking that it is quite impossible to accept the opinion of the doctor as to the testator's condition before 18th February when the doctor saw him, against the positive testimony of disinterested witnesses who saw the testator on 15th and 17th February and considered that his mind was then in a normal state.

[15] The appellant called in aid the well-known rules formulated by Baron Parke in (1838) 2 Moore P. C. 480,[1] that it is for the party propounding a will to satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator and, secondly, that if a party writes or prepares a will under which he takes a benefit that is a circumstance that ought generally to excite the suspicion of the Court. The first of those conditions has been fulfilled in this case; the second does not arise. There is no evidence that respondent 5, who derived the principal benefit under the will, had anything to do with the writing or preparation of it. Indeed, the evidence is that he took no part in the proceedings. Their Lordships can see no ground for suspicion in this case. The fact that the testator was admittedly in a state of health which had affected his memory and rendered him incapable of managing his estates falls far short of establishing that he was incapable of considering what dispositions of his property he should make in favour of members of his family, or that he did not understand the dispositions which in fact he did make.

[16] For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondents.

D.S. *Appeal dismissed.*

Solicitors for Appellant—*Douglas Grant & Dold.*
Solicitors for Respondents—*Lambert & White.*

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*[C. N. 48.]*

**A. I. R. (34) 1947 Privy Council 172**

*(From Peshawar)*

21st May 1947

LORD SIMONDS, LORD UTHWATT AND SIR JOHN BEAUMONT.

*Saran Singh — Appellant* v. *Dwarka Nath and others — Respondents.*

Privy Council Appeal No. 16 of 1946.

Civil P. C. (1908), S. 112—Concurrent findings of fact by lower Courts—Privy Council will not interfere in appeal. [Para 1]

('44-Com.) Civil P. C., S. 112 N. 6, Pt. 1.

*C. S. Rewcastle and P. V. Subba Row* — for Appellant.

*W. W. K. Page and C. Bagram* — for Respondents.

**Lord Simonds.**—In this case counsel for the appellant has been constrained to admit that there are concurrent findings of fact which, their Lordships consider, are a fatal obstacle to the success of this appeal. There is also a question of limitation which their Lordships think may be equally fatal. In the circumstances their Lordships will humbly advise His Majesty that

the appeal ought to be dismissed The appellant will pay the costs of the respondents in this appeal

G.N *Appeal dismissed.*

Solicitors for Appellant — *Hy S L Polak & Co*
Solicitors for Respondents— *T L. Wilson & Co*

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*[C N. 49]*

**A. I. R (34) 1947 Privy Council 173**

*(From (27) A I R 1940 All 41)*

**26th June 1947**

LORDS DU PARCQ, NORMAND, OAKSEY AND MORTON OF HENRYTON.

*Mt Jaggo Bai — Appellant v Hari Har Prasad Singh and another — Respondents*

Privy Council Appeal No 41 of 1943, Allahabad Appeal No 47 of 1939.

**Specific Relief Act (1877), S 19 — Contract for sale of mortgagee rights — Offer of performance by vendor not being bona fide refused by vendee — Suit by vendee for specific performance or in alternative for return of consideration — Former claim abandoned — Vendee if entitled to return of consideration and interest**

*A* agreed to transfer to *H* the mortgagee rights

entire rights unless *B* was made to join in the transfer *A* shall transfer to *H* her one half share for the half sum already paid *B* subsequently informed *H* that he agreed to abide by the transaction entered into by *A* provided he was paid his half share of the considera tion money. *H* after getting the advice of his counsel

fic performance and hence a decree for refund of consideration with interest from the date of refusal of the offer made by *A* and *B* to the date of payment was passed

*Held* that the offer made by *A* and *B* to execute a deed of sale on payment of Rs 26000 was not a *bona fide* offer to carry out the contract as that was not the actual amount due under the contract. *H* was entitled to refuse it and therefore the defendants and not the plaintiff were in breach of the contract [Para 13]

*Held further* that *H* was entitled to a refund of

never have obtained. *H* had never made any demand for repayment of the consideration save the demand in the plaint which was conditional upon the Court expressing the opinion that a decree for specific performance of the contract could not be passed and hence the wrongful withholding of that sum was as from the date of abandonment of the claim for specific performance Interest could not therefore be granted prior to that date [Para 14]

*A G P. Pullan and J M R Jayakar* — for Appellant

*C S Rewcastle and S Hyam* — for Respondents

**Lord Morton of Henryton.** — This is an appeal, by one of the two defendants in an action, from a decree of the High Court of Judicature at Allahabad, whereby the present appellant was ordered to pay to the plaintiff in the action, the respondent Rai Bahadur Hari Har Prasad Singh (hereafter called the "respondent") the sum of Rs 26,000, with interest thereon at the rate of 4 per cent per annum from 16 12 1928, down to the date of payment The other person named as a respondent, Seth Beni Chand, is not before their Lordships' Board and no question arises as to him

[2] The relevant facts are as follows On 18 2 1921, one Babu Bindeshwari Prasad executed a mortgage of a village called Nayagaon in favour of the appellant and her son Seth Beni Chand to secure a total sum of Rs 60,000 with interest. On 16 12 1928, the appellant signed a document whereby, after referring to the mortgage of 18 2 1921, she stated

'I, the executant, myself paid the entire amount of debt from my own pocket As I am a *pardanashin* lady I got the name of Seth Beni Chand entered in the mortgage deed by way of precaution At present I stand in need of money and it seems impossible for me to realize the amount of the document aforesaid "

[3] The remainder of the document, as set out in the judgment of the High Court, is as follows:

"Accordingly negotiations for transfer of the document aforesaid together with all the rights were started with Rai Bahadur B Harihar Prasad Singh through B Girja Sanker Vakil of Lucknow, and, it has been settled that I shall transfer the amount of the mortgage-deed aforesaid with interest together with all the rights and powers for a sum of Rs 52,000 and I shall see that the Rai Bahadur aforesaid acquires the entire property permanently In case the legal advisers of the Rai Bahadur aforesaid consider that I would not be in a position to transfer the entire property mentioned in the mortgage deed free from all defects and disputes, unless Seth Beni Chand is made to join the deed of transfer, I shall transfer to the Rai Bahadur aforesaid one half of the

of a cheque No 4 A 19 887, dated 28 11 1928, and I have this day received Rs 19 000 by means of cheque No 4-A 19,893, dated 16 12-1928, i e in all I have received a sum of Rs. 26,000 At the time of compliance

and completion of the deed of transfer I shall, as directed by the Rai Bahadur aforesaid, allow credit for the sum of Rs. 26,000 and accept the balance of the amount settled, whatever it might be, subject to the terms noted above."

By this document, as their Lordships construe it, the appellant agreed that she would either transfer the mortgage to the respondent or if the respondent's legal advisers took a certain view, she would transfer to the respondent "one half of the property mentioned in the document aforesaid." It is not necessary to consider how the latter form of transfer would have been framed or what would have been its effect; for reasons which will appear later, these questions did not arise in either of the Courts in India. The document does not contemplate that Seth Beni Chand shall be a party to the proposed transfer, either of the whole or the half, nor does it contemplate that he shall receive any part of the purchase price. It is clear from other documents that the appellant and her son were far from friendly at this time.

[4] On 25-12-1928, Seth Beni Chand wrote a letter to the respondent which is, so far as material, in the following terms :

"I too shall have no objection to the settlement made between you and my mother Mt. Jaggo Bai with regard to the mortgage-deed dated 18-2-1921, executed by B. Bindeshwari Prasad, deceased, *i.e.* she would transfer the mortgage-deed aforesaid to whomsoever you would write for a sum of Rs. 52,000 principal and interest. . . . . I also agree to that transaction, but out of Rs. 52,000 a sum of Rs. 26,000 ought to be given to my mother and a sum of Rs. 26,000 to me. If you have paid a sum of Rs. 26,000 to my mother so much so good and if you have not yet done so please do pay the amount."

The writer goes on to emphasize that the respondent should keep, "in deposit" the remaining half of the purchase price, and continues :

"As regards the existing dispute between me and my mother I shall soon get it settled. If, God forbid, it is not settled at an early date I shall get the amount from you after giving a sufficient security and you would not be put to loss. But if you without asking me pay the amount of my half share, *i.e.* Rs. 26,000, to my mother, I shall not be bound by the said settlement."

It appears therefore that, although the mother and son were both willing that the mortgage should be transferred to the respondent at the price of Rs. 52,000, they held differing views as to who should receive the purchase money. The mother insisted on receiving the whole, the son insisted on receiving half. In these circumstances it does not appear that the documents just quoted constituted an agreement whereof specific performance could have been obtained against both the mother and the son.

[5] In the events which happened, no transfer to the respondent was ever executed, and on 23-2-1929, both the mother and the son wrote letters by which they clearly refused to carry out any transfer. However, negotiations for the completion of the sale appear to have continued, for reasons which it is unnecessary to discuss, and on 7-12-1931, shortly before the expiry of the three year period mentioned in the document of 16-12-1928, a Vakil acting for the respondent served a notice on the appellant in the following terms :

"As directed by my client Rai Bahadur Hari Har Prasad Singh, resident of Arrah, notice is hereby given to you that as per agreement, dated 16-12-1928, you had promised that in case on the advice of and in consultation with the legal advisers the aforesaid Rai Bahadur should be willing you shall execute a deed of transfer, *i.e.* a sale-deed with respect to one-half of the demand including interest due under the mortgage-deed, dated 28-2-1921, for a sum of Rs. 60,000 executed by Babu Bindeshwari Prasad in favour of Mt. Jaggo Bai and Beni Chand in consideration for a sum of Rs. 26,000 which amount has already been received by you by means of two cheques and that you shall transfer to the aforesaid Rai Bahadur by means of execution and completion of the sale-deed all the rights and interest appertaining thereto ; and that you have not executed and completed the said document in spite of repeated demands and in spite of having received the amount referred to above. So if you fail to complete the document within a period of 4 days remedy shall be sought in Court after the expiry of the time allowed and you shall be saddled with costs."

[6] The notice went on to make an alternative offer, which need not be set out.

[7] By her reply to that notice, which is dated 11-12-1931, the appellant refused to comply with it, and rejected the alternative offer, but in a letter of 14-12-1931, signed by Seth Beni Chand and by counsel on behalf of the appellant, and also in certain telegrams, the defendants expressed their willingness to transfer the mortgage on payment of a further sum of Rs. 26,000. The respondent did not accept this proposal and in their Lordships' view he was justified in refusing to accept it. Both Courts in India found as a fact that the respondent had already paid Rs. 3000 on account of the purchase price to Seth Beni Chand, in addition to the Rs. 26,000 which he had paid to the appellant, and that the balance still remaining due was therefore Rs. 23,000 and not Rs. 26,000.

[8] On 23-2-1932, the respondent issued his plaint in the Court of the Subordinate Judge of Banda against the present appellant and Seth Beni Chand. The relief claimed by the plaint was as follows :

(a) That the defendants be ordered to execute a deed of assignment of their mortgagee rights under the mortgage-deed, dated 18-2-1921, executed by the late Bindeshwari Prasad in favour of the defendant on payments by tne plaintiff of a sum of Rs. 23,000 the balance of the amount of sale-consideration or any other amount that the Court may be pleased to fix and a decree in favour of the plaintiff be passed for the

specific performance of the contract against the defendants

(b) That if for any reason, in the opinion of the Court a decree for specific performance of contract can not be passed the defendants may be ordered to refund the sum of Rs 29 000 with interest to the plaintiff and a decreee for a sum of Rs 26 000 be passed against defendant 1 and for a sum of Rs 3000 against defendant 2 with interest by way of compensation from the date of payment up to the date of realisation and the Court may grant any further relief

(c) That the costs of the suit may be awarded to the plaintiff against the defendants

[9] It is to be noted that the respondent did not claim a transfer of "one half of the property mentioned in the mortgage deed ' from the appellant

[10] The case came on for trial before the Subordinate Judge, and on 20 2 1937, after all the evidence had been given, "Babu Makut Behari Lal, pleader for the plaintiff, stated that regard being had to the facts of the case, he does not want to press the point re specific perform ance prayed for in relief" The Subordinate Judge gave judgment on 19 3 1937. He held that each of the defendants "rescinded the contract without any reasonable cause" and that the res pondent (the plaintiff before him) was prepared to carry out his part of the contract and was entitled to be refunded the amount paid by him to the defendants He thought that each of the defendants should pay interest at the rate of 6 per cent per annum on the sums received by them respectively, up to the date of repayment of these sums by them Accordingly, he gave judgment in favour of the respondent for

costs should be paid by the defendants in certain proportions

[11] The present appellant appealed alone to the High Court of Judicature at Allahabad That Court held that the appellant Seth Beni Chand had "repudiated the contract," and that the Subordinate Judge was right in ordering the appellant to repay Rs 26,000 to the respon dent, but modified the order of the Subordinate Judge by giving to the respondent interest on the Rs 26,000 at the rate of 4 per cent only from 16 12 1928, down to the date of payment The appellant was ordered to pay the respon dent's costs of the appeal, and the order of the Subordinate Judge as to costs was left un disturbed

[12] Their Lordships do not think it could truly be said that there were concurrent findings of fact in the two Courts in India The finding that the defendants had repudiated or rescinded the contract was, in substance, an expression of opinion as to the true construction and effect of the relevant letters and telegrams

[13] The appellant appeals from the order of the High Court, and counsel contended on her behalf that the defendants in the action had never repudiated the agreement to transfer the mortgage and that the conduct of the respon dent amounted to a repudiation He relied parti cularly upon two points (1) that the appellant was never informed of the advice the respondent had obtained from his legal advisers, and (2) that the appellent and Seth Beni Chand had offered to transfer the mortgage to the res pondent by the letter of 14 12 1931 and the telegrams already mentioned As to the for mer contention, it was not a term of the sale agreement of 16-12 1928 that the res pondent should inform the appellant of the advice he had obtained and, in any event, their Lordships think that the notice of 7 12 1931 makes it reasonably clear that the respondent's legal advisers had advised him that the appel lant could not execute a valid transfer of the mortgage as a whole without the concurrence of Seth Beni Chand It is indeed difficult to see how the legal advisers could have arrived at any other conclusion, and the evidence shows that the respondent had taken advice At the trial before the Subordinate Judge a witness on be half of the respondent stated ' We had taken legal advice from Babu Ganga Prasad regard ing the agreement obtained from Mt Jaggo Bai " As to the latter contention, their Lord ships adopt the reasoning of the High Court, which was expressed as follows :

Rs 26 000 In these circumstances in our judgment the defendants and not the plaintiff are in breach of the contract "

[14] Their Lordships feel no doubt that the defendants refused to carry out the sale agree ment, and counsel for the appellant naturally felt unable to contend that if this were the true view of the matter, the claim for return of the Rs 26,000 paid to the appellant could be resisted He did, however, attack that portion of the decree of the High Court which awarded interest from 16 12-1928 onwards contending that no interest should be awarded, or alternatively, that no interest should be awarded prior to 20-2 1937 when the respondent abandoned his claim for specific performance of the sale agreement Their Lordships agree with the alternative contention They are prepared to assume in favour of the respondent, without deciding the point, that

interest could be awarded for an earlier period; but they are clearly of the opinion that the discretionary power to award such interest, if it exists, should not be exercised in the circumstances of the present case. During the whole of the period prior to 20-2-1937, the respondent was claiming specific performance of the sale agreement against both defendants to the action—a form of relief which, in their Lordships' view, he could never have obtained. The respondent had never, during that period, made any demand for repayment of the Rs. 26,000 save the demand in the plaint, which was conditional upon the Court expressing the opinion that a decree for specific performance of the contract could not be passed. At any time prior to 20-2-1937, the appellant could have resisted any claim for repayment of this sum, on the ground that the respondent was still seeking specific performance and that, if he obtained that relief, the appellant would be entitled to retain this part of the purchase price. As from 20-2-1937, having regard to the abandonment of the claim for specific performance, the respondent was rightfully claiming the return of the Rs. 26,000 and the appellant was wrongfully withholding that sum from him. In these circumstances, their Lordships think that an award of interest at 4 per cent. as from that date, but from no earlier date, does justice between the parties. The contrast between the position prior to 20-2-1937 and the position after that date when the respondent for the first time sought unconditionally the return of the money paid, does not appear to have been brought to the attention of the High Court and, in these circumstances, their Lordships feel justified in differing from the exercise by that Court of its discretion to award interest, even on the assumption that such a discretion existed in regard to interest accruing prior to 20-2-1937.

[15] Their Lordships will therefore humbly advise His Majesty that the decree of the High Court should be modified by altering the date for the commencement of interest from 16-12-1928 to 20-2-1937.

[16] Each party must pay his or her own costs of this appeal. The orders of the Courts in India as to the costs of the proceedings before them will remain undisturbed.

K.S. *Decree modified.*

Solicitors for Appellant — *Hore & Co.*

Solicitors for Respondents—*Douglas Grant & Dold.*

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[C. N. 50.]

## * A. I. R. (34) 1947 Privy Council 176

*(From (32) A. I. R. 1945 Pesh. 18)*

17th June 1947

LORD SIMONDS, LORD UTHWATT AND SIR JOHN BEAUMONT

*Malik Damsaz Khan — Appellant* v. *Commissioner of Income-tax, Punjab and N.-W.F. Province — Respondent.*

Privy Council Appeal No. 100 of 1945.

*(a) Income-tax Act (1922), S. 22 (2)—Return—Validity — Return incomplete and accompanied by statement that income given therein was approximate — Assessment under S. 23 (3) — Competency of—Appeal against assessment — Penalty imposed under S. 28 (1)—Validity — Income-tax Act (1922), Ss. 23 (3) and 28 (1).

Where an assessee when making his return fails to comply with the prescribed form in that he does not enter any details required by Note 5 (b) of the form, and makes a statement to the Income-tax Officer to the effect that he has no definite information about his income and that the income given in the return is merely approximate, it is competent for the Income-tax Officer to accept the return as a valid return and proceed to assessment under S. 23 (3); and there is no justification for the plea that the assessment was incompetent or that the Appellate Assistant Commissioner had no jurisdiction to entertain the appeal proceedings which the assessee has himself initiated against the order of assessment. Consequently an order by the Appellate Assistant Commissioner imposing a penalty on the assessee under S. 28 (1) is a valid order : 32 A. I. R. 1945 Pesh. 18, *Affirmed.* [Para 11]

(b) Civil P. C. (1908), S. 112 — New plea — Plea involving questions of fact which have not been raised.

The plea that the Income-tax Officer could not lawfully have made the assessment under S. 23 (3) as he had not given the necessary notice under S. 23 (2) and that for this reason the assessment must be treated as having been made under S. 23 (4) depends for its validity upon questions of fact which, if they have not been investigated, cannot be raised before the Privy Council. [Para 12]

('44-Com.) C. P. C., S. 112, N. 7, Pt. 2.

*C. Bagram and J. M. R. Jayakar*—for Appellant.

*J. Millard Tucker and A. A. Mocatta for J. Megaw*—for Respondent.

**Lord Simonds.** — The substantial question raised in this appeal which is brought from the judgment of the Court of the Judicial Commissioner, North West Frontier Province, is whether an order of the Appellate Assistant Commissioner, Rawalpindi Range, of 18th January 1942, imposing on the appellant a penalty of Rs. 14,000 under S. 28, Income-tax Act 1922, as amended up to the relevant date, is a valid order.

[2] The question arises in this way. The appellant during the years 1937 and 1938 carried on business as a supply contractor at Bannu in the North West Frontier Province, supplying livestock, wood and vegetables to the military units stationed in Waziristan. On 13th April 1938,

make a grievance of this fact even in the grounds of appeal filed by him in this Court, though he had taken as many as twelve grounds of appeal Three years after the filing of the appeal when the case was actually listed for hearing learned counsel for the appellant filed an application already mentioned by us above on 9 4 1946, and even in this application no such ground was taken

[13] On the evidence on the record, however, it is urged by learned counsel for the respondent that even if it was necessary to prove the mortgage deed, the mortgage deed was proved according to law That Bhagwan Das plaintiff went into the witness box and stated that Ali Tamkin had borrowed Rs 5000 from him and had executed and signed the mortgage bond which was Ex 1 in suit It does not appear,

deed We have now a single record system which means that the Judge takes short notes of the evidence in English while the witness is giving his evidence in the vernacular The notes of evidence recorded by the learned Judge are neither as full nor as complete as we would expect them to be The fact, however, remains that there was neither any clear issue on the point nor was there any ground of appeal clearly taken in this Court

[14] Learned counsel for the respondents has relied on the case in 12 A L J. 1114[5] and has urged that there was sufficient compliance with the requirements of S 68, Evidence Act. It is not necessary for us at this stage to go into this question as we feel that it would be proper if a clear issue is framed on the point and the lower Court is asked to record a finding on the same Before, however, we finally dispose of this case, we direct that the lower Court may remit a finding to this Court on the issue whether the mortgage deed in suit was executed by Ali Tamkin and was duly attested by the attesting witnesses The parties would be entitled to produce fresh evidence. The finding is to be remitted within three months from this date and ten days time will be allowed to the parties to file objections on receipt of the finding

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appeal with costs ]

V B B *Appeal dismissed.*

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**A I. R. (34) 1947 Allahabad 361** *[C. N. 136]*

## FULL BENCH

## MULLA, MALIK AND MOOTHAM JJ.

*Bal Krishna Maheshwari — Applicant* v. *Uma Shanker Mehrotra and another — Opposite Party*

Civil Revn No 278 of 1946, Decided on 5 3 1947, against order of Dist Judge, Cawnpore D/ 26-4 1946

*(a) Companies Act (1913) Ss 79 and 76—Jurisdiction of Court under S 79 — Question of impracticability of calling meeting has to be decided primarily with reference to Articles of Association — Scope of S 76

Where the annual general meeting of a company was not held within the time limit prescribed by the

In coming to this conclusion the Court held as follows

1 The question of impracticability or otherwise of calling a meeting within S 79 (3) must be decided primarily in the light of the Articles of Association of the Company unless such Articles contravened any mandatory provisions of the Act or there were no relevant Articles of Association governing the matter

3 The fact that a meeting might have been held with the consent of all the members after the time limit under the Articles of Association and before the expiry of the time under S 71 (1) did not affect the question as to the practicability of calling the annual

management of the affairs of the Company [Para 3]

(b) Companies Act (1913) S 79 (3) — Court if can decide validity of meeting

The District Court empowered under S 3 (1) Companies Act by virtue of notification by Central Government possesses unlimited jurisdiction for trying civil

the Court has jurisdiction to determine that question

The fact that the law does not provide for any appeal from an order passed in the exercise of that

*Sir Tej Bahadur Sapru, P L Banerji, Mushtaq Ahmed Sambhu Prasad, S N. Katju and Jalaluddin Ahmad*—for Applicant.

*Sir Alladi Krishnaswami Aiyar, G S Pathak, R N Gurtu, P N Hakkar, B. K. Khanna and A Hoon*—for Opposite Party

**Mootham J.**—This is reference to a Full Bench which arises out of a petition in revision under S. 115, Civil P. C., ...

one Bal Krishna Maheshwari, a member of the Merchants' Chamber of U. P. which is a Company limited by guarantee duly incorporated and registered under S. 26, Companies Act (7 [VII] of 1913). The petitioner challenged the validity of an order passed by the learned District Judge of Cawnpore on 26-4-1946, confirming a previous *ex parte* order passed by him on 28-3-1946, directing the calling of the annual general meeting of the Company on 27-4-1946. The challenge was made on the ground that the said order of the learned District Judge of Cawnpore was beyond his jurisdiction and on that basis the petitioner claimed the relief that the said order and the annual general meeting of the Company held in pursuance thereof should be declared to be null and void. The matter came up for consideration before a Bench of this Court and from the argument addressed by the parties two questions having an important bearing on the administration of the Company law arose for determination. In view of the importance of those questions, and the fact that they were not covered by any precedent of this Court or of any other High Court the Bench seized of the matter made the present reference with the object of having those questions fully considered and finally decided by an authoritative pronouncement of this Court.

[2] The material facts of the case and the points raised in the course of the argument have been set out at great length in the order of reference made by the Bench and we think it would be an obvious waste of time and labour to cover the whole ground again in the present judgment. As already stated, there are but two points of law which arise for consideration and we consider it necessary to state a few facts in order to bring out those points. Article 46 of the Articles of Association of the Company provides that an annual general meeting of the Company shall be held in every calendar year before the 31st of March. The dispute in the present case relates to the annual general meeting of the Company for the year 1946. It is an admitted fact that the last preceding annual general meeting of the Company had taken place on 3-2-1945. According to the Article of Association of the company referred to above, the annual general meeting of the Company for the year 1946 had to be called on some date before 31st March in that year. The management of the affairs of the Company lies in the hands of a Council of twenty-one members, including a President and a Vice-President, and the duty of calling the annual general meeting of the Company in every calendar year falls upon that Council. On behalf of the petitioner it is alleged that in accordance with the Articles of Association of the Company a clear fourteen days' notice for the annual general meeting in 1946 was issued and posted in due course on 13-3-1946, fixing 28-3-1946, as the date of the meeting. It is contended on the other side that though a notice was directed to be issued fixing that date, yet, in fact, no notice was issued and posted to any member of the Company until 15-3-1946, so that there could be no clear fourteen days' notice of the meeting as required by Art. 49 of the Company's Articles of Association. It is further alleged that a member of the Company, who received a notice of the meeting to be held on 28-3-1946, actually raised an objection that the notice was invalid and sent a written communication to that effect to the President of the Council who thereupon proceeded to cancel the meeting on 25-3-1946, and on 28th March made an application to the learned District Judge, Cawnpore, invoking his jurisdiction under S. 79 (3), Companies Act to call the annual general meeting. The two points of law which have to be determined in the present case turn upon the true interpretation of S. 79 (3), Companies Act and it is, therefore, necessary to set out its terms in extenso. The section runs as follows:

"If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act, the Court may, either of its own motion or on the application of any director of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given may give such ancillary or consequential directions as it thinks expedient, and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted."

For the purposes of appreciating the points raised before us in the argument on behalf of the petitioner it is necessary also to set out here the terms of S. 76, Companies Act, which runs as follows :

"*76.* (1) A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting.

(2) If default is made in holding a meeting in accordance with the provisions of this section, the company and every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company."

We may also mention here that the learned District Judge has found as a fact upon the evidence produced before him by the parties

that though a meeting of some sort was held on 28-3 1946, yet the notice calling a meeting on that date was not actually issued and posted until 15th or 16th March 1946, so that it did not leave a clear margin of fourteen days before 28 3 1946. Having arrived at that finding, the learned District Judge proceeded to hold that the meeting of some sort which had taken place on 28 3 1946, was not a valid meeting in the eye of the law and had consequently to be disregarded altogether He thus arrived at the conclusion that the calling of a valid meeting in the manner prescribed by the Company's Articles of Association had become impracticable and he consequently proceeded on 26 4 1946, to confirm his previous *ex parte* order of 28 3-1946, calling a general meeting of the Company on 27 4 1946. The petition before us challenges the validity of this order and consequently of the meeting held in pursuance thereof on the ground that it was beyond the jurisdiction of the learned District Judge

[3] It is not permissible in revision to go behind the finding of fact recorded by the learned District Judge and the argument before us has, therefore, proceeded on the assumption that though a meeting of some sort was held on 28 3 1946, yet there was no clear fourteen days' notice for that meeting as required by the Company's Articles of Association In view of the clear language of S 79 (3), it is evident that there is a condition precedent to the exercise of the jurisdiction conferred by it and that is that it must be found that for some reason it has become impracticable to call a meeting of a company in any manner in which meetings of that company may be called So far there is and can be no contest On behalf of the petitioner, the challenge against the jurisdiction of the learned District Judge is sought to be supported on two grounds and they give rise to the two points of law which we have to determine The first ground is that the question of the impracticability or otherwise of calling an annual general meeting must be decided not only in the light of the Company's Articles of Association, but also of the general provision contained in S 76 (1), which has been cited above It is contended on that basis that in the circumstances of the present case, the calling of the annual general meeting of the Company had not become impracticable, inasmuch as though the time limit prescribed by the Company's Articles of Association had expired, yet the wider limit laid down by S 76 (1), was still available and having regard to the fact that the last preceding annual general meeting had taken place on 8 2 1945, the annual general meeting for the year 1946 could validly be called at any time before 3 5-1946 It has been very strenuously argued on behalf of the petitioner that in the present case a conflict had arisen between the general provision contained in S 76 (1) and the Articles of Association of the Company and the former must prevail over the latter In support of his argument, learned counsel for the petitioner further contended that in S 79 (3) the phrase "in manner prescribed by the articles or this Act" must be applied to both the clauses that precede it and it must, therefore, be held that the impracticability or otherwise of calling a meeting has to be determined not only by reference to the Articles of Association of a Company, but also to the general provisions of the Act Upon a careful analysis of the language of S 79 (3) and of the general provision contained in S 76, we are unable to accept this contention. In our judgment, there are two distinct and separate clauses which precede the phrase "in manner prescribed by the articles or this Act" in S 79 (3) and it follows, therefore, that upon a plain grammatical construction of the language of the section the phrase is applicable only to the clause which immediately precedes it Section 79 (3) provides for two separate matters firstly, the impracticability of calling a meeting of a company in any manner in which meetings of that Company may be called and secondly, conducting the meeting of the company "in manner prescribed by the articles or this Act" It is worthy of note that the words "in any manner" occur in cl 1 and upon the reading suggested by the learned counsel for the petitioner the words "in manner" have to be repeated if the phrase "in manner prescribed by the articles or this Act" is applied to both the clauses that precede it Upon a plain reading of the language of the section, we are of the opinion that the question of the impracticability or otherwise of calling a meeting has to be decided primarily in the light of the company's Articles of Association We may here point out that the words "that company" in cl 1, are very significant They clearly show that the clause refers to a particular company and not to all companies, whereas the provision contained in S 76 (1) applies to every company It has, however, to be borne in mind that there may be cases in which the Articles of Association either fail to make any provision for a matter which is governed by the general provisions of the Act or make a provision which is in direct conflict with some mandatory provision of the Act applicable to all companies In the former case it would obviously be necessary to refer to the

will prevail and the provision contained in the Articles of Association will have to be disregarded. Apart from these exceptional cases, the question of the impracticability or otherwise of calling a meeting must be decided only by reference to the company's Articles of Association. We find further that in the circumstances of the case before us no conflict could really arise between the general provision contained in S. 76 and the Company's Articles of Association. Section 76 in sub-s. (1) lays down two mandatory provisions of general application to all companies relating to the calling of the annual general meeting, firstly, that the meeting shall be held once at least in every calendar year and secondly, that it shall be held not more than fifteen months after the holding of the last preceding general meeting. This sub-section does not prohibit any company from prescribing any time limit for the holding of its annual general meeting so long as the two mandatory conditions mentioned above are fulfilled. In the case before us, the Company laid down in Art. 46 of its Articles of Association that there shall be an annual general meeting of the Chamber which shall be held before the 31st of March, at such time and place, as the Council for the time being may determine." This provision did not contravene any one of the two conditions prescribed by S. 76 (1) and hence no question of any conflict between S. 76 (1), and the Company's Articles of Association arises at all. In prescribing a time limit for the holding of its annual general meeting in each calendar year the Company did not infringe any provision of the Companies Act. It is not one of the exceptional cases referred to above, and it follows, therefore, that the question of the impracticability of calling the annual general meeting in 1946 had to be determined only by reference to the Company's Articles of Association. The argument on behalf of the petitioner proceeds on the assumption that S. 76 enables the calling of an annual general meeting at any time after the expiry of the time limit fixed by a Company's Articles of Association and before the expiry of the wider time limit given by S. 76 (1). Upon a plain reading of the language of S. 76, we find that this assumption is not correct. An annual general meeting of a company may be called under sub-s. (3) of S. 76, on the application of any of its members, but the condition precedent is that a default must have taken place in holding the general meeting in accordance with the provisions of the section. It follows, therefore, that S. 76 can never operate for the purposes of calling an annual general meeting at any time within the limit prescribed by sub-s. (1). From this again it is clear that in the present case there could be no conflict between S. 76 on the one hand and the Company's Articles of Association on the other. Learned counsel for the petitioner contended that if the Directors of the Company had called and held the annual general meeting at any time after 31-3-1946, and before 3-5-1946, the validity of such a meeting could not possibly be challenged in view of S. 76 (1). It may have been possible for the Directors of the Company to call and hold such a meeting and that meeting may have been valid, but it could not be a meeting called and held either in accordance with the Company's Articles of Association or the provisions of S. 76. The meeting could be called and held with the consent of all the members, but the possibility of such a meeting being called and held cannot be taken into account for the purpose of deciding the question whether the calling of the annual general meeting had or had not become impracticable on the date on which the jurisdiction of the learned District Judge under S. 79 (3) was invoked. We are, therefore, of the opinion that the general provisions contained in S. 76 of the Act, have no application to the period intervening between the time limit for calling and holding and annual general meeting fixed by a Company's Articles of Association and the wider time limit for calling and holding such a meeting prescribed by S. 76 (1). At any time before the expiry of the wider limit prescribed by S. 76 (1) the jurisdiction conferred upon the Court by S. 79 (3) comes into operation and it can be invoked by a director or a member of any company for calling the annual general meeting. We find further that the jurisdiction of the learned District Judge was rightly invoked in the present case by the President of the Council in charge of the management of the Company's affairs.

[4] The second ground on which the jurisdiction of the learned District Judge has been assailed is that S. 79 (3) is only a procedural provision which does not confer any judicial power on the District Judge to enter into and decide the question of the validity or otherwise of a meeting alleged to have been held. It is contended that where the jurisdiction of the Court is invoked under S. 79 (3) of the Act, for the purpose of calling a meeting and an objection is raised that a meeting has in fact already been called and held, all that lies in the power of the Court to do in the exercise of its jurisdiction is to decide the question of fact and if it finds that the fact of a meeting having been held has been established, it must immediately stay its hand and has no jurisdiction to proceed further to decide whether the meeting was valid or invalid. It was

strenuously argued that as soon as the issue of the validity or otherwise of a meeting is raised the Court acting under S 79 (3) of the Act must declare that it has no jurisdiction to proceed any further and must leave the parties to pursue their remedy in the civil Court At one stage of the argument learned counsel for the petitioner tried to maintain that the Court acting under S 79 (3) ceased to have any jurisdiction as soon as an objection was raised before it that a meeting has actually been held The claim that the jurisdict on of a Court can be ousted merely by an allegation is obviously extravagant and it was not therefore pressed but the learned counsel laid great emphasis on the fact that an order passed by the Court in the exercise of its jurisdiction under S 79 (3) of the Act is not open to any appeal even though the order might affect valuable r ghts and, on this ground we were asked to infer that the law could not possibly have intended to confer upon the Court the jurisdiction to determine the validity or otherwise of a meeting In our judgment the position taken on behalf of the petitioner is untenable It is conceded that there are no express words in the statute which place the suggested limit on the jurisdict on of the Court under S 79 (3) but it is contended that the lack of jurisdiction to decide the question of the validity or otherwise of a meeting must necessarily be inferred from the fact that no appeal has been provided from an order made by the Court in the exercise of its jurisdiction under that section In dealing with this question we must first of all point out that all jurisdiction under the Companies Act has been conferred by S 3 (1) in the first instance upon the High Court having jurisdiction in the place at which

jurisdiction to enter into and decide the question of the validity or otherwise of a meeting There is further provis on in the same section that the Central Government may by notification in the official gazette and subject to such restrictions and conditions as it thinks fit empower any District Court to exercise all or any of the jurisdiction by this Act conferred upon the Court and in that case such District Court shall as regards the jurisdiction so conferred be the Court in respect of all companies having their registered offices in the district The District Judge at Cawnpore exercises jurisdiction under the Companies Act in accordance with this provision and it has not been suggested that the Central Government has placed any restrictions upon his jurisdiction It follows therefore that the District Judge at Cawnpore possesses the same jurisdiction which has been conferred upon the High Court by S 3 (1) of the Act Now, when the Court empowered under S 3 (1) proceeds to exercise the jurisdiction conferred upon it by S 79 (3) the very first question which it has to decide is whether the calling of a meeting has become impracticable It is open to any party to challenge the exercise of that jurisdiction and for that purpose it may be alleged as in the present case that a meeting has actually been called and held and hence the basic condition on which *the Court can proceed to exercise its jurisdiction* for calling a meeting does not exist at all Such an allegation must necessarily amount to assertion that the meeting alleged to have been held fulfils all the requirements of the law No objector can be allowed to ask the Court to stay

tion is made the issue which immediately arises for decision is Has a valid meeting been in fact called and held ? The Court must proceed to find not only whether a meeting of some sort has been held but that the said meeting fulfilled the requirements of the law before it can refuse to exercise its jurisdiction The Court may find that a meeting of say nine persons was held though the quorum required by the law was ten and the question is whether upon such a finding the Court must stay its hand and declare that it has no further jurisdiction in the matter In our judgment the answer is obviously in the negative The Court cannot shut its eyes to the fact that the meeting actually held was not a meeting in the eye of the law and if it takes that fact into account it must proceed to hold that the calling of a meeting has become impracticable provided that the time limit fixed *for the calling of such a meeting* by the Company s Articles of Association has expired or the calling of the meeting within that time limit in the manner prescribed by the Articles of Association has become impossible We see no reason at all why such an issue should not be determ ned by the Court There is nothing in the language of S 79 (3) upon which the contention of the learned counsel for the petitioner can be founded It was strenuously contended by learned counsel that the determination of such an issue might often involve the decision of complicated questions of fact and law and it must therefore be inferred that the law did not contemplate the determination of such a question in a miscellaneous proceeding under S 79 (3) We are not impressed at all by this argument because we do not think that in the large majority of cases any complicated questions of law and fact will arise for considera

trying Magistrate has imposed upon the applicant not merely a fine of Rs. 100 but a further punishment of forfeiture of certain property belonging to him. The case is, therefore, outside the ambit of S. 414, Criminal P. C. and I think it would be wrong in these circumstances to hold that the applicant had no right of appeal.

[7] The result, therefore, is that I allow the application in revision made by Chhotu and direct that the appeal filed by him in the Court of the Additional Sessions Judge at Muzaffarnagar shall be heard and disposed of in accordance with the law. It is not necessary for me to pass any order upon the reference made by the learned Additional Sessions Judge, for it would be open to the learned Judge himself upon hearing the appeal to pass any order demanded by law and justice.

V.B.B.     Petition allowed.

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**A. I. R. (34) 1947 Allahabad 338 [C. N. 138.]**

**Sinha J.**

*Ram Saran — Plaintiff — Appellant v. Khushi Ram and another — Defendants — Respondents.*

Second Appeal No. 607 of 1944, Decided on 13-1-1947, from decree of Civil Judge, Muttra, D/- 1-4-1943.

Hindu Law — Alienation — Powers of Hindu widow—Legal necessity—Prudent course of management—Alienation for discharging mortgage.

The powers of alienation which the Hindu Law confers upon a widow are restricted. The pressure on the estate, the danger to be averted, the benefit to be conferred, these and such like are the heads of legal necessity. An alienation by her is also justified on the ground of prudent course of management : 7 A. I. R. 1920 All. 347, Rel. on.     [Para 10]

There is no pressure on the estate and no danger to be averted where the mortgage for the discharge of which the alienation is effected is one with possession : 11 A. I. R. 1924 All. 538, Rel. on.     [Para 12]

Nor can it be said that the alienation is dictated by a prudent course of management where a slight care on the widow's part would have enabled her not only to redeem the mortgage but to save a substantial portion of the property.     [Para 11]

*Cases referred:*—

1. ('20) 1919-18 A. L. J. 41 : 7 A. I. R. 1920 All. 347 : 42 All. 119 : 55 I. C. 133, Pahalwan Singh v. Jiwan Das.
2. ('24) 1923-22 A. L. J. 374 : 11 A. I. R. 1924 All. 538 : 79 I. C. 1110, Bandhu Ram v. Ram Kishun Sunar.

*K. C. Mital* — for Appellant.

*M. L. Chaturvedi* — for Respondents.

**Judgment.**— This is a plaintiff's appeal and arises out of a suit for a declaration that the sale of 6-3-1940, granted by one Mt. Jhunia in favour of Khushi Ram, is not binding on him. Mt. Jhunia, who was alive on the date of the suit, was the widow of one Gokul. The plaintiff claims to be Gokul's reversioner.

[2] The plaintiff came to Court on the allegation that the sale was not justified by legal necessity and that the lady, who was an old lady, executed the document without really understanding it. The defence, in the main, was that the plaintiff was not the reversioner, the transaction was justified by legal necessity and the lady executed the sale deed after fully understanding it.

[3] The learned Munsif in a judgment, marked by care and ability, found that the plaintiff had succeeded in proving that he was the reversioner of Gokul. He found that part of the consideration mentioned in the sale deed was fictitious and as for the other part, he found that there was no legal necessity for it. In the result, he decreed the plaintiff's suit. On appeal, the learned Civil Judge in a judgment which hardly redounds to his credit, agreed with the learned Munsif in his finding that the plaintiff had succeeded in proving the pedigree. He also agreed with him that part of the consideration was fictitious. He disagreed with him with regard to the rest and found that it was justified by legal necessity. In the result, he dismissed the suit. The plaintiff has come to this Court in second appeal.

[4] The facts appear to be briefly these: Mt. Jhunia was the widow of one Gokul who had a brother, Bhagwant. The sale deed in dispute was executed by the lady for Rs. 1500. Its ostensible consideration was as below:

(1) Rupees 375 for payment to Kanhaiya Lal's promissory note Ex. C dated 11-4-1930 for Rs. 200; (2) Rs. 225 for payment of Radha Raman's promissory note Ex. F dated 12-5-1931 for Rs. 125; (3) Rs. 500 for payment to the mortgagees Mt. Dhanno, Ganga Shyam, Moolia, Mt. Sundari, Mt. Chironji and Radha Lal without specifying whether the amount was payable under one, two or more mortgage deeds and without giving any further details about the mortgage or mortgages; (4) Rs. 350 paid in cash and (5) Rs. 50 paid for costs of stamp and registration: Total : Rs. 1500.

[5] The Courts below are agreed that the two promissory notes were fictitious. They have differed with regard to the 3rd and 4th items—Rs. 500 for payment to the mortgagees and Rs. 350 paid in cash. The controversy before me has centred round these two items.

[6] The history of the transaction dates back to the years 1878 and 1881. On 5-7-1878, Gokul the husband of the lady, and his brother, Bhagwant executed a usufructuary mortgage in favour of Badle, Nand Kishore and Mt. Juglo. Bhagwant died issueless and on 16th April, Mt. Jhunia renewed the mortgage. The second mort-

gage was executed on 20 7 1881, by Gokul in favour of Mani Ram This mortgage was renewed by Mt Jhunia on 13 8 1903 in favour of a number of persons It is for the discharge of these mortgages that a sum of Rs 500/ was left in the hands of the vendee, but curiously enough, the recital is lacking in very important particulars The names of the mortgagors are not mentioned, nor is the amount due to them, nor are the dates or years, when they were executed mentioned It is also not clear whether the mortgages sought to be redeemed were one or more than one

[7] The learned Munsif found that the old mortgages still remain unredeemed and the sale was made, not for the purpose of redeeming the mortgages, but for the so called purpose of paying off the fictitious promissory notes, executed in favour of Radha Raman and Kanhaiya Lal, uncle and nephew Indeed, he found that Radha Raman, Kanhaiya Lal Ram Hari, a nephew of the lady, and the vendee Khusi Ram, had entered into a sort of a conspiracy to defraud the lady and the object of the transaction was not the discharge of the prior debts The fourth item is a sum of Rs 350/- alleged to have been paid in cash before the Sub Registrar The learned Munsif found that out of this sum, a sum of Rs 325/ went to Ram Hari and Rs 25/ or 30/ remained with the lady for the ostensible purpose of her maintenance

[8] The learned Civil Judge, on the other hand, found that although according to the recital in the sale deed, the sum of Rs. 500/ was left in the hands of the vendee, nevertheless the sum due *on the earlier mortgage* was Rs 745/-. He, however, found, that on the date of the suit the mortgages had not been redeemed

[9] As regards the sum of Rs 350/ the learned Civil Judge found that Rs 120/- out of it went to Ram Hari on account of the debt to him from the lady, and the balance of Rs 200/ was deposited with him to defray her future maintenance

[10] Before addressing myself to the legal position created by the earlier mortgages for the discharge of which the sum of Rs 500/ was left in the hands of the vendee, I propose to deal with the sum of Rs 350/ (cash) which passed before the Sub Registrar The learned counsel for the respondent had to concede that he cannot place before me any authority which affords an even remote parallel to the case before me It is too late in the day to challenge the proposition that the powers of alienation, which the law confers upon a Hindu widow, are restricted The pressure on the estate the danger to be averted, the benefit to be conferred, these and such like are the heads of legal necessity There is another class of cases which has introduced yet another head and this had slightly enlarged her powers by justifying the alienation on the ground of prudent course of management *vide* 1920 A L J 41 [1] It is not pretended that there was any 'pressure on the estate nor was there any 'danger to be averted' or benefit to be conferred The sale of the property for the possible contingency of maintenance will not, to my mind, stamp the alienation with the incidents of transaction dictated by a 'prudent course of management. As I deal with 3 item, the sum of Rs 500/ I shall try to show that a slight care would have enabled her not only to redeem the earlier mortgages but to save a substantial portion of the property

[11] The usufructuary mortgages embraced 6 43 acres The entire estate of her husband consisted of 10 2 acres besides some miscellaneous plots The husband had, it is common ground, died about forty years before the suit, which was instituted in 1941 It is not denied that she had been able to live on the income derived from the residue of the land *in her hands* 3 59 acres Not only that she had succeeded in 1903 and 1908 in recovering a portion of the property in the hands of the mortgagees I find from the judgment that one of the mortgages was redeemed by raising a loan upon a portion of the property covered by that mortgage with the result that she paid off the earlier mortgage freed from the mortgage the rest of the property and retained some money in her hands The sale of an extensive area of 6 43 acres for a small amount of Rs 500/- or Rs 745/ must from all points of view, be condemned as an *improvident transaction* A prudent course of management dictated otherwise She could have, as he had done in the past sold—the transactions in effect amount to a sale and nothing less—a small portion and saved the rest which would have been more than enough for her needs

[12] I, however do not propose to pursue this line of reasoning further as, in the view of law which I propose to take the transaction is not binding upon the plaintiff for yet another reason The mortgages of 1903 and 1908, were mortgages with possession There was therefore no pressure on the estate and no danger to be averted In circumstances almost similar, this Court in 1923 A L J 354 [2] refused to uphold an alienation made for redeeming an earlier mortgage, which was not mature Indeed the facts of the present case are if possible stronger than those of that case That was a case of a hypothecation bond which had not become mature and where the interest was mounting up Here there was no such apprehension

[13] I am, therefore of opinion that the entire transaction was beyond the capacity of the lady and no part of it is binding upon the plaintiff He

case cannot result in the acquittal of the accused without the Magistrate passing any order in exercise of that discretion."

The principle enunciated is applicable to the present case. Unless the Magistrate passes an order that the complaint is allowed to be withdrawn, the mere return of the complaint will not amount to an order of withdrawal, and, therefore, the consequences of a withdrawal will not follow.

[14] In A. I. R. 1933 Nag. 78[6] at p. 80 it is observed :

"No consent of the Court to the withdrawal of the prosecution in respect of an offence under S. 363 was ever obtained and it is laid down in A. I. R. 1929 Nag. 133[7] that an order passed under S. 494, Criminal P. C. must be passed like any other considered order and the Magistrate is bound to give his reasons. A fortiori is the Magistrate bound to give his consent to a withdrawal? no tacit assent may be assumed. From the order passed—and this is the only record of what took place—it would appear that the Magistrate did not think that his consent was necessary. The Code lays down that the consent is necessary and the order giving the consent is, as has been held in this Court, a judicial order."

In that case the Magistrate ignored the complaint under S. 363, Penal Code on the statement of the Prosecuting Inspector that this section be dropped and the case was transferred to a second class Magistrate. It was, therefore, held that the order did not amount to an order granting withdrawal of the complaint. The same view was repeated in A. I. R. 1938 Nag. 76[8].

[15] The case may be looked at from another aspect. The order of the Magistrate for the return of the complaint was an order not contemplated by the Criminal Procedure Code. The Court has no jurisdiction to return the complaint. The order was, therefore, an invalid order and, as such, can have no effect. Reference may be made to the case reported in 1934 A. L. J. 1061[9].

[16] Another way of looking at the case at this stage is that if the order of the Magistrate be taken to be an order granting withdrawal of the complaint, the order is bad inasmuch as no adequate grounds for the withdrawal of the complaint were put forward and the Magistrate did not exercise his discretion judicially in allowing the withdrawal of the case. If the complainant had known that his erroneous request for the return of the complaint instead of direct request for the adjournment of the case for a sufficiently long time had led to the acquittal of the accused, the complainant could have come up in revision and in all probability the order allowing the withdrawal and consequently acquitting the accused would have been set aside. This Court has the power to revoke the order granting withdrawal of a case. This has been held in A. I. R. 1938 Nag. 334,[10] A. I. R. 1920 Pat. 202[11] and A. I. R. 1939 Cal. 220.[12]

[17] We are, therefore, of opinion that the order of 18-10-1944 did not amount to the grant of withdrawal of the complaint and, therefore, did not operate as an acquittal of the accused and that the present trial of the accused on the re-submission of the complaints in July 1945 is valid. We accordingly dismiss this revision.

D.H. *Revision dismissed.*

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*[C. N. 140.]*

## A. I. R. (34) 1947 Allahabad 372

MALIK AND RAGHUBAR DAYAL JJ.

*Bal Govind — Appellant v. Shri Ram and another — Respondents.*

First Appeal No. 480 of 1942, Decided on 8-8-1946, from decision of (Temporary) Civil Judge, Cawnpore, D/-29-8-1942.

Succession Act (1925), S. 263— Defective citation —Just cause.

Where a will has been proved to be genuine, the grant of the letters of administration cannot be revoked merely on the technical ground that the grant was made without citing proper parties : 15 A. I. R. 1928 P. C. 2, *Foll.* [Para 5]

*Case referred :—*

1. ('28) 7 Pat. 221 : 15 A. I. R. 1928 P. C. 2 : 55 I. A. 18 : 107 I. C. 14 (P. C.), Mt. Ramanandi Kuer v. Mt. Kalawati Kuer.

*N. P. Asthana, G. S. Pathak and B. R. Avasthi* — for Appellant.

*S. N. Seth and S. Zakir Ali* — for Respondents.

**Malik J.**—This appeal has been filed by one Bal Govind who had filed an application for revocation of letters of administration granted to the respondents.

[2] Mt. Raj Rani was the wife of the appellant, Bal Govind. She died in the year 1941. It was alleged by the respondents that she had left a will dated 28-11-1941. An application for the letters of administration on the basis of the will was filed in the Court of the learned Temporary Civil & Sessions Judge, Cawnpore, on 2-2-1942 by Shri Ram on behalf of himself and his younger brother, Shyam Lal, who was a minor. In that application no relations of Mt. Raj Rani were cited to whom special citation could be issued. Even the name of her husband was not disclosed in that application as one of the persons to whom notice should be sent, though in the body of the application it was mentioned that she was daughter of Jodha and wife of Bal Govind. Under S. 278, Succession Act (39 [XXXIX] of 1925) the application for letters of administration should contain the names of the relatives of the deceased and their respective residences so that notices should be issued to them. No notice was therefore issued

to Bal Govind and the letters of administration were granted to the applicants, Shri Ram and *Shyam Lal On 8 7 1942, Bal Govind filed* an application for revocation of the letters of administration on the ground that no notices were issued to him and the letters of administration were fraudulently obtained by concealing the name of Bal Govind It was further mentioned that the will was forged and the lady had died on 24 11 1941, four days before the date of the alleged execution of the will The lower Court had, therefore, two points for decision before it, firstly, whether just cause had been made for the revocation of the grant of letters of administration on the ground that special citations were not issued to Bal Govind, and secondly, whether the letters of administration should not be granted because the will relied upon by the applicants was a forged will. Both the parties produced witnesses It appears that the objector, Bal Govind, led his evidence first and it was after the close of his evidence that the witnesses were examined on behalf of the respondents The lower Court considered the evidence produced on behalf of the objector as well as on behalf of the respondents and came to the conclusion that the will was genuine and held that there was therefore no sufficient cause for the revocation of the letters of administration It is against that order that Bal Govind has filed this appeal

[3] Learned counsel for the appellant has argued that the proper procedure for the Court below was to have annulled or revoked the letters of administration that had already been granted and then asked the propounders of the will to prove the will in the presence of the objector and issued fresh letters of administration if the Court was satisfied as regards the genuineness of the will His argument is that Shri Ram and Shyam Lal knew of the existence of Bal Govind and of his relationship to Mst Raj Rani They had, therefore, deliberately, when making the application for letters of administration, *omitted his name though they were* bound under S 278 to mention his name as one of the persons to whom special citations should be issued He has urged that under S 263, Indian Succession Act, the grant of probate or letters of administration may be revoked or annulled for just cause and the fact that the letters of administration were obtained by concealing from the Court something material to the case was a just cause for the revocation of the letters of administration The argument of learned counsel is that this was a case where if his client had come to know of the proceedings and special citations had been issued to him, he would have put the applicants to prove the will and the will would have been proved in his presence and he would have had an opport*unity of cross examining the witnesses* and producing other evidence before the Court to show that the will was not genuine This argument of the learned counsel has no doubt great force and if the matter had been only at the preliminary stage we would have held that, by reason of the fact that the applicants had not cited the husband as a person to whom special citation should be issued, the ex parte grant of the letters of administration should be revoked and the applicants should be directed to prove the will in the solemn form But the difficulty has arisen by reason of the fact that the parties themselves produced evidence on the question of the genuineness of the will and after having recorded such evidence as the parties wished to produce, the Court came to the conclusion that the will was genuine It would be useless waste of time if we were now to ask the Court below to revoke the letters of administration and record the evidence afresh which has already been recorded and then to grant letters of administration

[4] In a case where the procedure adopted by the trial Court was the same as in this case their Lordships of the Privy Council held that neither party could be said to have been prejudiced by the procedure adopted and went into the question whether the will was or was not genuine, *see* 7 Pat 221[1] Dealing with this point, their Lordships after quoting S 50, Probate and Administration Act of 1881, which has now been replaced by S 263, Succession Act, observed as follows

"It is apparent that the plaintiff in this case set up both these grounds for revocation (that is, that the grant was made without citing parties who ought to *have been cited and the will of which probate was*

"If on the other hand the plaintiff failed on the first issue that would not preclude her from proceeding to prove her second ground, *viz*, that the will was forged, and the probate would stand or fall according to the result"

[5] It would appear from the above quotation that where a will has been proved in the solemn form, after citing the parties who ought to have been cited and there is no just cause for revocation, if any one of them challenges the validity of the will, and wants the probate revoked on that ground, then it is for him to prove that the will was forged If, on the other hand, there is sufficient ground for revoking the probate apart from the question of genuineness of e will then it is for the propounder ove

the decree cannot bind anybody who was not a party. [Para 20]

('44-Com.) Civil P. C., S. 92 N. 7 Pt. 1.

(f) Letters Patent (Bombay), Cl. 12 — Deity at Muttra — Suit against de facto manager—Jurisdiction of Bombay High Court — Civil P. C. (1908), S. 92.

Where a deity situate at Muttra had properties at Bombay and Muttra and the *de facto* manager carried on the worship of the deity at Muttra and managed its Muttra properties, any suit against the *de facto* manager either for possession of the property situate there or for a scheme could not under cl. 12 be filed in Bombay High Court. [Para 23]

('44-Com.) Civil P. C., S. 92 N. 38.

*Cases referred :—*


1. ('45) 32 A. I. R. 1945 Cal. 376 : I. L. R. (1944) 2 Cal. 144, Sri Annapurna Devi v. Shiva Sundari.
2. ('45) 32 A. I. R. 1945 Cal. 268, Jyoti Prasad v. Jahor Lal.
3. ('23) 45 All. 319 : 10 A. I. R. 1923 All. 160 : 71 I. C. 480, Sheo Ramji v. Sri Ridhnath Mahadeoji.
4. ('05) 32 Cal. 129 : 31 I. A. 203 : 8 Sar. 698 (P. C.), Jagadindra Nath Roy v. Hemanta Kumari.
5. ('41) I. L. R. (1941) 2 Cal. 477 : 29 A. I. R. 1942 Cal. 99 : 199 I. C. 486, Tirit Bhusan Ray v. Sridhar Saligram.
6. ('37) 24 A. I. R. 1937 Cal. 559 : 41 C. W. N. 1349 : 174 I. C. 122, Panchakari Roy v. Amodelal.
7. ('10) 37 Cal. 128 : 3 I. C. 642, Bhupati Nath v. Ram Lal.
8. ('25) 52 I. A. 245 : 52 Cal. 809 : 12 A. I. R. 1925 P. C. 139 : 87 I. C. 305 (P. C), Pramatha Nath v. Pradhyumna Kumar.
9. ('35) 57 All. 159 : 22 A. I. R. 1935 P. C. 44: 62 I. A. 47: 153 I. C. 1100 (P. C.), Mahadeo Prasad Singh v. Karia Bharti.
10. ('31) 35 C. W. N. 768 : 18 A. I. R. 1931 Cal. 776 : 135 I. C. 273, Girishchandra Saw v. Upendra Nath.
11. ('15) 37 All. 86 : 2 A. I. R. 1915 All. 25 : 26 I. C. 778, Niamat Ali v. Ali Raza.
12. ('27) 14 A. I. R. 1927 Mad. 69 : 98 I. C. 812, Moideen Bibi Ammal v. Rathnavelu Mudali.


*G. S. Pathak, V. D. Bhargava and Ajai Singh*— for Appellants.

*S. C. Das and D. Sanyal* — for Respondents.

**Malik J.** — The facts of this case are very simple. One Khetsi Tilloo was a Hindu residing in Bombay. He came to Muttra and ultimately settled there. He had a private deity and before he died he executed a will dated 25-10-1909, by which he dedicated all his properties to the deity. The deity is known as Charnarvind Sri Thakur Gokuleshji Maharaj and is installed in the house situate in Golpara at Muttra. In accordance with the terms of this will one Mt. Saraswati Bai, who was no relation of Khetsi Tilloo and, as a matter of fact, belonged to a different caste, was appointed the manager and mutwalli after him. On her death, one Chaturbhuj son of Dongersi, who was the wife's sister's son of Khetsi Tilloo, was to be the mutwalli. Khetsi Tilloo did not nominate any one as mutwalli after Chaturbhuj. He, however, appointed four persons as managers or supervisors and gave them the right to nominate a mutwalli after the death of the two persons nominated by him. The will further provided that the four persons nominated by him or their survivor had the right to appoint a successor to any of them. It is admitted that the four supervisors are all dead and that they took no interest in the deity or in its management, nor did they appoint any one as their successor. It is further the common case of the parties that Chaturbhuj Doongarsee predeceased Mt. Saraswati.

[2] Khetsi Tilloo died on 27-3-1914. On his death, Mt. Saraswati became the mutwalli and, as such, was in possession of the property dedicated to the deity. Chaturbhuj died sometime in the year 1935 and Mt. Saraswati died in September 1936. Mt. Saraswati had on 27-2-1936 executed a will under which she appointed Mukhia Tirbhuwan Das, defendant 1 as the mutwalli. This she must have done as she realised that Chaturbhuj being already dead and the four supervisors appointed by the founder having all died there was no one who could appoint the next mutwalli. She further nominated five persons as trustees or supervisors and gave them the same powers as had been given to the supervisors appointed by Khetsi Tilloo, the only difference being that while the will of Khetsi Tilloo was a brief document, Mt. Saraswati's was more elaborate and contained clearer directions as to the management and *sewa, puja*. After the death of Mt. Saraswati, Mukhia Tirbhuwan Das, defendant 1 took charge of the deity and its *sewapuja* and took possession of the properties at Muttra. Since September 1936 Mukhia Tirbhuwan Das has thus been managing the property of the deity at Muttra.

[3] In the trust properties are included houses Nos. 105 and 107 situate in mohalla Khand Bazar, Qazi street, Bombay. In the will of Khetsi it was provided that Chaturbhuj Doonarsee was to realise the rent of these houses and pay Rs. 50 per month to Mt. Saraswati for the expenses of the Thakurji and the rest of the income he could utilise for his own purposes. It is clear from the will of Khetsi that the two houses were dedicated to the deity but Chaturbhuj during his lifetime was to remain in possession of the two houses and utilise the balance of the income, after payment of Rs. 50 for his own purposes. There is no provision for Chaturbhuj's wife or his descendants. After the death of Mt. Saraswati, when Mukhia Tirbhuwan Das got into possession of the property of the deity at Muttra and started managing the same, he gave notice on 19-10-1936, to Mst. Velabai widow of Chaturbhuj, claiming Rs. 2,500 from her as the income of the houses. Mt. Velabai, it appears, did not send any reply. On 1-7-1937 plaintiff 1 Doongarsee Shyamji Joshi of Bombay, filed a suit in the Bombay High Court as the

next friend of the deity against Velabai for possession of the properties belonging to the diety *and for the preparation of a scheme* The suit was compromised and a compromise decree was prepared on 6th August 1937 under which Dongarsee Shyamji Joshi, Gordhan Das Vallabh Das Dayal and Velabai were appointed mana

that defendant 1 was not a validly appointed mutwalli of the deity and was not entitled to attend to or carry on the worship Possession of the house in Muttra was claimed and it was prayed, among other prayers, that a decree in favour of the plaintiffs for possession of the house and certain movable properties might be passed in their favour It may be noted here that no allegations were made in the plaint about mismanagement of the properties nor was there any charge that defendant 1 had not duly performed (?) and looked after the deity The plaint was based simply on the allegation that the defendant had no legal right to possession as Mt Saraswati could not appoint her successor and that the plaintiffs were legally entitled to bring the suit and to eject the defendant and obtain possession of the property

[5] The suit was defended on the ground that the plaintiffs had no right to bring the suit The defendant also alleged that he had been duly appointed the mutwalli and that he was not bound by the decree of the Bombay Court to which he was no party and which was further alleged to be a collusive decree Defendants 2 to 5 were the supervisors nominated by Mt Saraswati and it does not appear that they filed any written statement or took any interest in the suit Defendant 6 Bhikhimal Saraf, (who on the death of Ram Das defendant became defendant 5), was in possession of certain movables belonging to the deity and was, therefore, impleaded He too does not appear to have put in any *appearance*

[6] The lower Court framed nine issues It held that Mt Saraswati had no right to appoint her successor and the defendant was, therefore, not a duly appointed mutwalli, but he was in fact, in possession of the property and was the *de facto* manager of the deity As regards the plaintiffs, the lower Court held that plaintiffs 1 to 3 had no right to bring the suit and that the defendant was not bound by the decree of the Bombay High Court which the lower Court held was also collusive The result therefore was that the plaintiffs' suit was dismissed with costs

[7] The plaintiffs have filed this appeal On behalf of the plaintiffs learned counsel for the appellants has urged two points His allegations are firstly that the diety is himself a party to *the suit through a next friend and the position* of a deity being exactly the same as that of a minor, any one could file a suit as the next friend of the diety and if the lower Court had considered that another person should be appointed as the next friend the Court should have made the appointment, but no such objection having been taken it must be now accepted that plaintiffs 1 to 3 could act as the next friends of the deity and the deity being the owner of the property the suit was bound to be decreed. His next argument is that the decree of the Bombay High Court preparing the scheme of management is binding on all and though the defendants were no parties to the same their only remedy was to go to the Bombay High Court and to ask that Court to modify the scheme if they could satisfy that Court that the scheme was not in the best interest of the deity and that the defendant could not in this case ask the Court to go behind that decree and to hold that plaintiffs 1 to 3 were not the properly appointed trustees of the property at Muttra

[8] The first argument of learned counsel is that any one can file a suit as the next friend of the deity and that to such a suit the provisions of O 32 Civil P C though strictly not applicable, should be applied so that the decree could be passed in favour of the deity and all that the Courts need see is whether the person purporting to act as the next friend has any interest adverse to the minor and in case the Court is of the opinion that the person purporting to act as the next friend is not a proper person, the Court may

that the suit was brought on behalf of the deity by plaintiffs 1 to 3 as the next friends The defendants, if they had any such objection should have urged in the Court below that plaintiffs 1 to 3 had some interest adverse to the deity, and in *that case the Court might have appointed an*other next friend on the analogy of O 32 and the rules in that order framed by this Court That the defendants never having taken any such objection in the Court below it must be held that no objection could be taken to plaintiffs 1 to 3 acting as next friends of the idol The analogy of a deity being treated as a minor is a very imperfect analogy and we cannot carry it far enough to make O 32 Civil P C applicable In cases where the sebaits of a temple have done something which is obviously adverse to the interest of the institution it may be that the Courts would allow a di interested third party to file a suit but such suits m [illegible] the

interest of the foundation or the deity, as the case may be. The cases relied on by learned counsel where a sebait transferred property belonging to the deity and a stranger was allowed to file a suit as next friend can be distinguished on that ground.

[9] Learned counsel has relied on the case in A. I. R. 1945 Cal. 376.[1] In that case an application was filed by Sm. Karunamoyee Dassi who wanted to be appointed the next friend of the plaintiff deity Thakurani Sri Sri Annapurna Debi with the object of continuing the suit in the name of the idol for the setting aside of certain transfers of the debutter property made by the sebait. The argument was that ordinarily the proper person to sue on behalf of an idol was the sebait and that in certain circumstances it may be that somebody else could be appointed to look after the interests of an idol in a suit. It was held by Sen J.:

"It is obvious that circumstances may well arise when it would be impossible to expect any of the sebaits to institute a suit; for instance, all the sebaits may be misappropriating debutter property and secularizing it; the idol may be despoiled by all the sebaits acting in concert. In such a case, it is not possible to expect any of the sebaits to institute a suit to protect the property of the idol. In those circumstances what is to happen? It seems to me that the only course open would be for some person to come forward and institute a suit as the next friend of the idol. The matter would first come up before the Court by a suit being instituted by a person claiming to be next friend of the idol. It would be permissible for the defendants thereafter to come up before the Court and contest the fitness of the next friend to act as such. The Court would then investigate the matter and decide upon the suitability of the persons instituting the suit to act as next friend."

[10] Learned counsel strongly relied on these observations, but, to our mind, those observations must be restricted to a suit of the nature before that Court where the suit was brought obviously in the interest of the deity to protect it from its sebaits who were trying to misappropriate the debutter property, the reason being that in a case of that kind the only way the Court could give relief to the deity was by holding that the action of the sebaits was illegal and was not binding on the deity.

[11] Learned counsel has also referred to certain observations of a Bench of the Calcutta High Court in A. I. R. 1945 Cal. 268.[2] The facts of that case were that there was a suit filed by a Hindu deity Sri Sri Iswar Sridhar Jieu Thakur for the recovery of some money lent, and the question that arose in that case was who was the proper person entitled to represent the deity in that suit. Tushar Ranjan claimed to represent the deity as one of the plaintiffs (plaintiff 2), the suit being constituted as one by the deity represented by its sebaits. Plaintiff 1 was Nirmal who was also one of the sebaits. The other sebait Harimohan was impleaded as a *pro forma* defendant. The trial Court at first held that the loan was not due to the deity, but the advance was made by Harimohan out of his private funds and dismissed the suit. There was an appeal in the Calcutta High Court which was allowed and the case was remanded. After the remand none of the plaintiff-sebaits appeared and the pleader informed the Court that he had no instructions to proceed with the case. The result was that the suit was dismissed for default. It was at this stage that Jyoti Prasad appeared on the scene and claimed that he had been appointed sebait under a document executed by Harimohan who was one of the sebaits and he filed an application for restoration of the suit on the allegation that the other sebaits had entered into a collusive arrangement with the debtors at the expense of the deity and the question, therefore, arose whether Jyoti Prasad could continue the proceedings. Various points were raised in the case, one of the points being whether the suit must be deemed to be a suit by the deity or by the sebait. It was argued that if it was a suit by the sebait then Jyoti Prasad's application to continue the suit must be deemed to be barred by limitation under S. 22 (1), Limitation Act. The main discussion in the case centred round the point whether the right to sue vested in the deity or in its sebaits, as it was held that Jyoti Prasad was also a duly appointed sebait. The case is not very helpful for the decision of the point whether a third party can or cannot file a suit as next friend, but even in that case Joyti Prasad was allowed to continue the suit on the finding that the sebaits who had originally filed the suit had colluded with the defendants and had done something which was prejudicial to the interest of the deity. The decision of this Court in 45 ALL. 319[3] by Ryves and Daniel JJ. is also to the same effect. That was a suit for the recovery of property wrongfully alienated by the sebait and it was held that the suit by a disinterested person connected with the idol acting as its next friend was maintainable.

[12] In the case before us there are no allegations that it is in the interest of plaintiff 4, the deity, that the defendant should be removed and plaintiffs 1 to 3 put in charge of its property, nor are there allegations of any waste or mismanagement. There are no allegations in the plaint that defendant 1 is not a fit person to look after the deity or that he is not looking after the deity and its property properly. Neither the defendant nor plaintiffs 1 to 3

can claim to be the properly appointed sebaits of the deity and Saraswati Bai, who was the last sebait was as great a well wisher of the deity as plaintiffs 1 to 3 and it cannot be said that when she selected defendant 1 and put him in charge, though strictly speaking she may not have had the legal authority, she did not act in the best interest of the deity The result of accepting the argument of learned counsel would be that any person can constitute himself as the next friend of a deity and file a suit in the name of the deity for possession of the property by the dispossession of a *de facto* sebait who may be managing the property and looking after the deity to the satisfaction of everybody and get hold of the property in the name of the idol till such time as he is dispossessed again by somebody else We are not prepared to hold that such is the law that any third person can constitute himself as next friend and file a suit and claim an absolute right to possession of the property simply because he has filed the suit in the name of the deity

[13] Learned counsel for the respondent has placed great reliance on a decision of their Lordships of the Judicial Committee in 32 Cal 129[4] In that case their Lordships dealing with the respective rights of an idol and its sebait held that though the idol was the owner of the property the sebait had the right of management, and dealing with the question of limitation whether a suit brought by a sebait who was a minor on the date when the cause of action arose and who brought the suit within 3 years after attaining majority was within time, their Lordships observed

> 'But assuming the religious dedication to have been of the strictest character it still remains that the possession and management of the dedicated property belongs to the sebait And this carries with it the right to bring whatever suits are necessary for the protection of the property Every such right of suit is vested in the sebait not in the idol And in the present case the right to sue accrued to the plaintiff when he was under age . . .

earned counsel for the respondent has urged at the idol has no right of suit and the right sts only in the sebait The point was fully nsidered by Nasim Ali and Biswas JJ in A I R 5 Cal 268[3] and by Nasim Ali and Pal JJ in R (1941) 2 Cal 477[5] In the latter case Nasim J pointed out the similarity and the difference een a minor and a Hindu idol In every the question arises whether the suit is ht in the enforcement of the right which in the plaintiff who has filed the suit, a case where a sebait has filed a suit for nforcement of his own rights there can doubt that he is entitled to maintain the suit in his own name An idol, though it i juristic person, is in charge of its sebait w for all practical purposes represents it B there may be cases where the right of t sebait and the right of the idol are at confl and in such a case it may be that the idol ma bring a suit for the vindication of its right through a disinterested third party as its nex friend We do not think we can accept the contention of learned counsel for the respondent that an idol has no right of suit at all, though we agree with him that a suit in the name of the idol can be filed only in the interest of the idol and not with the object of getting hold of its property by the person purporting to act as next friend

[14] Learned counsel for the respondents has also relied on a decision of the Calcutta High Court in A I R 1937 Cal 559[6] where in a case of a private debutter it was held that a third party, who was not a member of the family, had no right of suit and that such right was possessed only by a *de jure* manager or by a *de facto* manager who was in possession of the property and was exercising the right in the interest of the idol His contention is that this is a case of a private debutter and the deity and its property are in the possession of the defendant who is therefore, its *de facto* manager and the plaintiffs' suit being a suit for possession merely on the strength of the compromise decree of the Bombay High Court the only point for decision in the case is how far the compromise decree of the Bombay High Court binds the deity and the defendant To our mind this contention is correct, though we must say that there is a certain amount of misconception about the term "private idol' and 'public idol

[15] There is really no such thing as an idol which is the private property of an individual or a family or which belongs to the public According to Hindu philosophy, an idol, when it is installed in a temple is the physical personification of the deity and after consecration the stone image gets its soul breathed into it Before an idol can be installed in a temple, the temple must be dedicated to it and it becomes its private property The books of ritual contain a direction that before removing the image into the temple the building itself should be formally given away to God for whom it is intended The sankalpa, or the formulae of resolve, makes the deity himself the recipient of the gift which, as in the case of other gifts, has to be made by the donor taking in his hands water, sesamum, the sacred kush grass and the like It is this ceremony which divests the proprietorship of the temple from those who had built it and vests it in the image which by the process of vivification

has acquired existence as a juridical personage. A temple building, therefore, under the strict Hindu law is the property of God and the idol and cannot be the private property of an individual or a family or a section of the public. The property dedicated to an idol in an ideal sense vests in the deity, though no Hindu professes to give the property to God. He only dedicates it to the worship of God and under the strict Hindu law the King, who is the servant and the protector of the deity, is the custodian of the property : *see* 37 Cal. 128[7] at p. 153.

[16] In 52 I. A. 245,[8] a case in which the question of the location of the private idol was in suit, their Lordships of the Judicial Committee observed :

> "It must be remembered in regard to this branch of the law that the duties of piety from the time of consecration of the idol are duties to something existing which, though symbolising the Divinity, has in the eye of the law a status as a separate *persona*."

At page 255 of the same report their Lordships refused to give countenance to the argument that the idols or images which Mutty Lal had set up were his personal property and that he had left them absolutely to Jadu Lal and Jadu Lal might, if he had so pleased, have thrown them into the river. Again at page 256, their Lordships have observed :

> "An argument which would reduce a family idol to the position of a mere movable chattel is one to which the Board can give no support. They think that such an argument is neither in accord with a true conception of the authorities, nor with principles."

In that case, though the temple was a private temple, their Lordships held that the will of the idol in regard to location must be respected and sent the case back to the High Court of Calcutta with a direction that the idol should appear by a disinterested next friend appointed by the High Court, so that the wishes of the idol may also be ascertained by the Court with respect to its location.

[17] To our mind, the only difference between a private and public temple is that while in a private temple the public at large have no right to worship or right of management, they have these rights in a public temple. In both such trusts the rights and liabilities of the deity must always be the same. This does not apply to a case where, though the property is dedicated to the idol, there are further directions as regards the income and in such cases people, who are beneficially interested in the fund, may have certain independent rights of their own. In the case of a public temple the public have a right of worship and a right of management and they are entitled to have their rights properly protected under S. 92, Civil P. C. In the case of a private temple the Court would not entertain a suit at the instance of a person who can have no interest in the temple as he does not belong to the family of the founder. Courts may, in those special cases where the person in charge of a private temple or its properties has done something against its interest, allow a member of the public to act as the next friend of an idol to bring a suit solely in the interest of the idol and for the protection of the property, but such a suit cannot be entertained unless it is clear that the suit has been filed in the interest of the idol and for the vindication of its rights. We have already held that there are no allegations in the plaint that this is a suit of that nature. The suit is in vindication of the right of plaintiffs 1 to 3 to be the persons entitled solely to look after and manage the property of the deity and that claim of the plaintiffs can only be based on the compromise decree of the Bombay High Court.

[18] Coming to the decree of the Bombay High Court, we have already mentioned the circumstances in which the consent decree was passed by that Court. The suit was filed on the original side of the Bombay High Court by Thakur Gokleshji Maharaj through its friend Doongersey Shamji Joshi of Bombay against Velabai, widow of Chaturbhuj Doongersey. The relief claimed in the plaint, as appears from the consent decree, was that it be declared that the properties described in Exs. A and B to the plaint, that is, the properties in Bombay and Muttra, belonged to the deity and that some fit and proper person be appointed to conduct the worship of the plaintiff deity with power to take charge of and manage the said properties and lastly that a scheme be framed for regulating the worship of the plaintiff and for appointment of successors to continue the worship of the plaintiff. Velabai was not interested in the trust or the trust properties, she being the widow of Chaturbhuj Doongersey who had predeceased Saraswati Bai. Chaturbhuj Doongersey was the wife's sister's son of the founder and it cannot be said, therefore, that he belonged to the family of the founder. His widow was no doubt in wrongful possession of the house property in Bombay, otherwise she had no interest. We do not know what interest Doongersey Shamji Joshi had in the deity. The case was compromised and Doongersey Shamji Joshi, Velabai and one Gordhandas Vallabhdas Dayal, became the managers and trustees under this compromise. In the compromise no rights were reserved for the heirs of the founder—we do not know whether there were any — and it was assumed that the right of worship was vested in the family of Chaturbhuj Doongersey. Under the law, as we have already said, the family of Chaturbhuj Doongersey had no such vested

right of management of the property of the deity or of its worship

[19] The compromise also gave the defendant and other members of the family of Chaturbhuj Doongersey the absolute right to remove the deity from Muttra to Bombay It would appear, therefore, that in this compromise it was assumed that Chaturbhuj Doongersey should be treated as the founder and all the rights that the founder or his family had were given to the family of Chaturbhuj Doongersey But as in the case before their Lordships in 52 Cal 809[8] the wishes of the idol as regards its location were not considered The compromise decree cannot have any greater sanctity or binding effect than the compromise on which it was based The compromise between the plaintiff and the defendant of that case could not bind a third party who was not a party to the compromise and further the compromise was not such that we can say that the interest of the idol was considered by the Court and a proper scheme was prepared by it

[20] In a proper case where all parties interested in a deity or in its management or worship are impleaded and the deity itself is represented by a disinterested third party, the Court may, after giving due consideration to the matter, prepare a scheme which may be considered to be binding against third persons not so interested, for example, if in the case of a private deity all the persons interested therein are parties to a suit, in a scheme prepared by the Court, a trustee or manager so appointed may have the right to claim rent from tenants or eject a trespasser or file suits in his own name as sebait and the Courts may not allow the defendant to raise the question of the propriety of his appointment As a matter of fact, even a de facto sebait's or de facto mutwalli's right to bring such suits is now well recognised In 57 ALL 159,[9] their Lordships of the Judicial Committee recognised the right of a de facto mahant of a math, accepted as such by all persons interested and in possession of the math, to bring a suit for recovery of property from a trespasser for the benefit of the math The right of a de facto sebait or mutwalli has also been recognised in 41 C W N 1319,[6] 35 C W N 768,[10] 37 ALL 86,[11] A I R 1927 Mad 69[1?] and other cases But we cannot hold that by a compromise decree of the kind, as in this case, the parties to the compromise can assume the right to eject the de facto manager of the deity when he was no party to the compromise In the case of a suit for a scheme under S 92, Civil P C, the suit is filed in a representative capacity and on behalf of the public and as such, the other members of the public may be bound by the decision. It cannot be claimed that the Bombay suit was a representative suit and the decree binds anybody who was not a party

[21] Learned counsel for the respondents has urged that only a person interested in the endowment i e who belonged to the family of the founder could apply for a scheme in a private trust It is not necessary for us in this case to consider that point as we feel satisfied that the suit filed in the Bombay High Court was not a suit filed in the interest of the deity, nor was the interest of the deity properly considered, nor was it properly represented in that litigation. In any case, we must hold that the person who was the de facto manager or sebait at the time when that suit was filed was a necessary party to that suit We, therefore agree with the decision of the Court below that the plaintiffs are not entitled to rely on the decision of the Bombay High Court and urge that the consent decree gives them an absolute right of possession and that the defendant has no right to challenge their authority

[22] Learned counsel for the appellants has urged that the only remedy open to the defendant is to go to the Bombay High Court to have the consent decree set aside before he can challenge the competency of the plaintiffs to maintain the suit The defendant was no party to that Bombay suit and we do not see why it is necessary for him to go to that Court The lower Court has held that the Bombay suit was collusive Learned counsel has urged that there was no evidence of any collusion and that no such case of collusion or fraud was suggested in the cross examination of the plaintiffs or their witnesses It is not necessary for us to go to the length of holding that the suit in the Bombay High Court was filed as a result of any fraud or collusion but there is no doubt that that suit was filed soon after the defendant had given a notice to Velabai In that suit the defendant was not impleaded as a party and the suit was compromised, the parties to the litigation appointed themselves as managers and trustees and gave themselves the right to take charge of the idol's property Under the circumstances we cannot hold that the decree of the Bombay High Court gives the plaintiffs a right to dispossess the defendant who is the de facto shebait and take charge of the deity or its property

[23] Under S 120 Civil P C, (Act 5 [V] of 1908) Ss 16, 17 and 20 of the Code do not apply to a High Court in exercise of its original civil jurisdiction Under Cl 12, Letters Patent the High Court of Judicature at Bombay has original civil jurisdiction to try suits in cases of immovable property where such property is situate within the original jurisdiction of that

Court or where the cause of action has arisen within the same limits, and if the cause of action has arisen in part within the local limits of the ordinary original jurisdiction of the Court then with the leave of the Court, or if the defendant at the time of the commencement of the suit was living or carrying on business within those limits. The deity in the case before us was in Muttra. The defendant was in charge of its property at Muttra and was carrying on the worship of the deity at Muttra. Any suit against the defendant who was the de facto manager either for possession of the property situate there or for a scheme could not be filed in the Bombay High Court and we, therefore, agree with the contention of learned counsel for the respondent that the Bombay High Court had no jurisdiction to entertain the suit for preparation of a scheme for the worship of the idol situate in Muttra. In the result this appeal is dismissed and the decree of the trial Court is affirmed. Plaintiffs 1 to 3 must pay the costs of the defendant-respondents in both the Courts.

D.N. *Appeal dismissed.*

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## A. I. R. (34) 1947 Allahabad 882 [C. N. 245.]

### SINHA AND RAGHUBAR DAYAL JJ.

*Bhola Nath and others—Judgment-debtors—Appellants v. Panna Lal—Decree-holder—Respondent.*

Ex. First Appeal No. [illegible] of 1945, Decided on 16-[illegible]-1947, from decision of Civil Judge, Allahabad, D/-21-[illegible]-1945.

Civil P. C. (1908), O. 3, R. 4—Advocate—Power to compromise.

An Advocate engaged by the holder of a decree can compromise the decree on behalf of his client without specific authority: 17 A. I. R. 1930 P. C. 158, Rel. on. [Paras 8, 9]

('44-Com.) C. P. C., O. 3 R. 4 N. 7 Pt. 7.

*Case referred:—*

1. ('30) 1930 A. L. J. 489: 17 A. I. R. 1930 P. C. 158: 57 Cal. 1311: 57 I. A. 133: 127 I. C. 345 (P. C.) Sourendra Nath v. Tarubala Dasi.

*N. P. Asthana, G. S. Pathak and P. N. Misra*—for Appellants.

*S. P. Bhargava*—for Respondent.

**Sinha J.**—This is an appeal by the judgment-debtors against an order of the learned Civil Judge of Allahabad, refusing to certify the adjustment of a decree. On the basis of a mortgage executed by Bhola Nath and others, Mool Chand obtained a preliminary decree for a sum of Rs. [illegible] which was made final on [illegible]-1943. After the usual proceedings, 22-12-1944 was fixed for the auction sale. Mool Chand had meanwhile transferred his decree in favour of the respondent, Panna Lal.

[2] On 21-12-1944, that is one day before the date of the sale, the judgment-debtors presented an application, supported by an affidavit sworn by Bhola Nath, under O. 21, R. 2, Civil P. C. praying for the adjustment of the decree, on the allegation that it had been settled that Panna Lal would accept Rs. 7,000 in full satisfaction of the decree. This application was resisted by Panna Lal. He did not say that there was no talk of an adjustment. His case was that it was agreed that the money would be paid to him by 1st of December, and, as that was not done, the negotiations failed.

[3] The learned Civil Judge found that the story with which the judgment-debtors went to the Court in support of their application, was not a true story; on the other hand, the truth lay with Panna Lal. In the result, he rejected the application. The judgment-debtors have come to this Court in appeal against that order.

[4] When the case came before us on the 5th instant, we thought it was pre-eminently a case for compromise and granted a short adjournment. No compromise has been arrived at.

[5] Panna Lal had examined in support of his version one Mr. Vishwanath Pande, a lawyer practising in the District Courts. The judgment-debtors had, in support of their version, examined another lawyer, Mr. Lakshmi Das Gupta also practising in the District Courts. The truth lay between these two versions, and we thought an amicable settlement would, in the peculiar circumstances of the case, be conducive to the interest of all concerned. It is, however, to be regretted that a settlement has not been possible.

[6] The learned Civil Judge has devoted considerable time and care to the case, but it is obvious that he has based his judgment largely on the statement of Mr. Vishwanath Pande. In so doing, he has discredited the version of the other lawyer, Mr. Lakshmi Das Gupta. It is true that there are circumstances, which, seemingly, tend in favour of the version of the decree-holder, but a careful analysis of the whole of the evidence principally, the probabilities of the case, tip the scale in favour of the judgment-debtors. We do not propose to follow the learned Civil Judge in accepting, at its face value, the testimony of Mr. Vishwanath Pande and rejecting altogether the testimony of Mr. Lakshmi Das Gupta. We do not propose to address ourselves in detail to their statements. We prefer to rest our decision upon the probabilities of the case and upon such evidence as fits in with those probabilities. (After considering the evidence and probabilities of the case and holding that there was a compromise his Lordship proceeded:)

[7] Dr. Sen has also contended that the vakalatnama did not confer any power upon Mr. Vishwanath Pande to come to terms on behalf of his client. In the first place, the state-

ment of Mr Vishwanath Pande itself militates against this suggestion He says

'Panna Lal when I pressed told me that if he was paid Rs 7 000 by 1 12 1944 he would accept it in total satisfaction of the decree

Whether the initiative for the compromise came from Mr Vishwanath Pande himself, or it was taken at the instance of his client the fact remains that a stage was reached when Mr Vishwanath Pande purported to act on behalf of his client and under his instructions

[8] It is too late in the day, after the pronouncement of their Lordships in 1930 A L J 489 [1] to contend that a specific authority to compromise is necessary Say their Lordships at page 492

[9] We are of opinion that Mr Vishwanath Pande had, by virtue of his position as an advocate and also because he had received definite instructions from his client, ample power to settle the dispute We have also come to the conclusion that the story of the judgment debtors that the matter had been compromised at a sum of Rs 7 000 is borne out by the probabilities of the case We might repeat that, in arriving at our conclusion, we have been influenced solely by the probabilities We mean no aspersion upon Mr Vishwanath Pende Nor do we share the criticism by the learned Civil Judge of the conduct of Babu Lakshmi Das Gupta

[10] We therefore, allow the appeal, set aside the order of the Court below and hold that there was an adjustment of the dispute within the meaning of O 21, R 2 Civil P C

[11] We are informed by the learned counsel for the parties that the auction sale was held on 22 12 1944 and Panna Lal has withdrawn a sum of Rs 6059 12 0 out of the sum deposited by the appellants In view of our decision that there was an adjustment of the decree at Rs 7 000 Panna Lal is entitled to retain only a sum of Rs 7,000 and must refund the balance He shall do it within a fortnight of this date

[12] We have on a consideration of all the facts come to the conclusion that this is a fit case in which the parties should bear their own costs throughout

G N *Order accordingly*

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A. I. R. (34) 1947 Allahabad 383 *[C N 144]*

VERMA C J AND WALI ULLAH J

*District Board, Bijnor — Applicant v Mohammad Abdul Salam—Opposite Party*

Civil Revn No 504 of 1944 Decided on 7 1 1947, from order of Dist Judge Moradabad D/ 28 7 1944

**(a) Provincial Insolvency Act (1920) S 9 (1) (c) —Transfer of property by debtor worth more than Rs 100 — Limitation under S 9 (1) (c) should be counted from date of registration of sale deed and not from date of its execution**

Where the act of insolvency alleged against the debtor is the transfer by him of property worth more than

***(b) Provincial Insolvency Act (1920) S 9 (1) — Word 'creditor in Ss 6 (b) 7, 9 (1) and 54 does not include person who becomes creditor of debtor after date of transfer or other act of insolvency — Such creditor cannot apply for adjudging debtor as insolvent—Word creditor in aforesaid sections cannot be interpreted in same sense as word 'creditors' in S 53 T P Act — Provincial Insolvency Act (1920) Ss 6 (b) 7 and 54**

The word creditor as used in Ss 6 (b) 7 9 (1) and 54 does not include a person who becomes a creditor of the debtor after the date of the transfer or other act of insolvency Hence such a creditor cannot apply for the adjudication of the debtor as insolvent *English case law considered* [Para 16]

It is always dangerous to seek to construe one statute by reference to words of another There are important differences between the law of insolvency and the provision of S 53 T P Act and hence the word creditors in Ss 6 (b) 7 9 (1) and 54 cannot be construed in the same sense as the word creditors in S 53 T P Act so as to include those becoming creditors after the transfer 25 A I R 1938 P C 152 *Rel on* [Para 13]

*A* s suit against *B* was decreed by the trial Court

insolvency

*Held* that as it was only after the transfer by *A* to his wife that *B* became a creditor of *A* when his appeal was allowed and *A* s suit dismissed the petition by *B* for adjudication of *A* as insolvent was not maintainable [Para 16]

**(c) Transfer of Property Act (1882) S 53—S 53 includes future creditors of transferor**

The term creditors in S 53 includes not only creditors of the debtor at the time of the transfer but also those who subsequently become his creditors i e, future creditors of the transferor are also within the scope of S 53 [Para 13]

(45 Com) T P Act S 53 N 11 Pts 3, 4

**(d) Provincial Insolvency Act (1920)—Interpretation—Applicability of English law—Basis of Indian insolvency legislation is English Law of Bankruptcy — Reference to English law on point not clarified by statute law in India is of great advantage—Interpretation of statutes**

The basis of the Indian insolvency legislation is the English law of bankruptcy. In India, as in England, the law relating to bankruptcy is essentially the creation of statute. In both countries the basis of the law is the same viz., the Roman principle of *cessio bonorum*, or the surrender by the debtor of all his goods for the benefit of his creditors in return for immunity from process. It is, therefore, not only permissible but also of great advantage to see what the English law is on a particular point which is not clarified by the provisions of the statute law in India as it is to-day. [Para 14]

(e) Provincial Insolvency Act (1920), S. 2 (1)— Word "creditor" is correlative to debtor and signifies person to whom debt i. e. liquidated or specific sum of money is due. [Para 12]

*Cases referred :—*

1. ('35) 16 Lah. 735 : 22 A. I. R. 1935 Lah. 565 : 158 I. C. 226 (F.B.), Lakhmi Chand v. Kesho Ram.
2. ('34) 58 Mad. 166 : 21 A. I. R. 1934 Mad. 637: 151 I. C. 1054, S. Iswarayya v. Kurubasubbanna.
3. ('33) 20 A. I. R. 1933 Mad. 185 : 141 I. C. 101, Muthiah v. Official Receiver, Tinnevelly.
4. ('38) 25 A. I. R. 1938 Mad. 801 : 179 I. C. 240, Venkadari Somappa v. Official Receiver, Bellary.
5. ('34) 21 A. I. R 1934 Nag. 171 : 150 I. C. 834, Kanhaiyalal v. Sadashiv Rao.
6. ('37) 24 A.I.R. 1937 Nag. 197 : I. L. R. (1937) Nag. 403 : 169 I. C. 683, G. W. Godbole v. Marotisa Balusa.
7. ('38) 25 A. I. R. 1938 Nag. 454 : I. L. R. (1939) Nag. 377 : 178 I. C. 479, Balkisan v. Bhanu Prasad.
8. ('44) 31 A. I. R. 1944 Cal. 370, Indo Burma Traders Bank Ltd. v. Barada Charan.
9. ('38) 25 A. I. R. 1938 Cal. 417 : I. L. R. (1938) 2 Cal. 275 : 178 I. C. 727, Ramananda v. Pankaj Kumar.
10. ('34) I. L. R. (1934) 12 Rang. 263 : 21 A. I. R. 1934 Rang. 216: 151 I. C. 670, U, Ba Sein v. Maung San.
11. ('37) 24 A. I. R. 1937 Rang. 446 : 1937 Rang. L. R. 375 : 172 I. C. 126 (F.B.), U On Maung v. Maung Shwe Hpaung.
12. ('38) 25 A. I. R. 1938 P. C. 152 : I. L. R. (1938) 2 Cal. 381 : 32 S. L. R. 502 : 65 I. A. 263 : 174 I. C. 564 (P. C.), Nippon Yusen Kaisha v. Ramjiban Serowgee.
13. (1878) 39 L. T. 361 : 48 L. J. Bk. 43 : 27 W. R. 156, In re Whelan; Ex parte Sadler.
14. (1895) 1 Q B. 189, In re King & Beesley.
15. (1808-16) 1 Camp 489, Moss v. Smith.
16. (1927) 1 Ch. 19 : 96 L. J. Ch. 33 : 136 L. T. 182, In re Debtors (No. 669 of 1926).
17. (1870) 6 Ch. A. 546 : 40 L. J. Bk. 49 : 24 L. T. 782 : 19 W. R. 833, Ex parte Haywars.
18. (1889) 24 Q. B. D. 71 : 38 W. R. 148, In re Hecquard ; Ex parte Hecquard.

*Jagnandan Lal* — for Applicant.

*M. A. Kazmi* — for Opposite Party.

**Waliullah J.** — This is an application in revision under S. 75, Provincial Insolvency Act. It arises under the following circumstances: It appears that Mohammad Abdul Salam, the opposite party, filed suit No. 152 of 1940 for recovery of a certain amount of damages from the District Board, Bijnor, which is the applicant before us. This claim was in respect of a contract for plying a ferry granted by the District Board. On 31-10-1941 the suit was decreed for a sum of Rs. 721/4/- with proportionate costs. Against this decree the District Board filed an appeal in the Court of the District Judge. On 12-11-1942 this appeal was allowed with the result that the suit filed by Abdul Salam was dismissed. It appears that while the appeal was pending in the Court of the District Judge, Abdul Salam in execution of his decree, realised a sum of Rs. 874/7/- from the District Board in February 1942. Thereafter, while the appeal against him was still pending in the Court of the District Judge, Abdul Salam appears to have executed a sale deed of his entire property in favour of his wife on 3-7-1942 for a sum of Rs. 800 which was only a portion of the dower debt alleged to be due to his wife. This sale deed was registered on 13-8-1942. It may be noted here that this Court on 24-7-1942 pronounced its judgment in Second Appeal No. 89 of 1941 between the District Board of Bijnor and one Mohammad Sharif. This second appeal arose in circumstances very similar to those of Suit No. 152 of 1940, instituted by Abdul Salam against the District Board, Bijnor and the High Court decided the case in favour of the District Board and against Mohammad Sharif. As mentioned above, the learned District Judge allowed the appeal on 12-11-1942, with the result that the claim of Abdul Salam stood dismissed with costs. The District Board took no proceedings for restitution under S. 144, Civil P. C. presumably because it realised that it would be difficult to recover from Abdul Salam the money which he had realised in execution of his decree.

[2] On 13-11-1942, the District Board filed a petition in the Insolvency Court under S. 7 read with S. 9, Provincial Insolvency Act, praying that Abdul Salam might be adjudged insolvent on the ground that he had committed an act of insolvency inasmuch as he had transferred the whole of his property with intent to defeat or delay his creditors within three months of the presentation of the application. At the hearing of this application, it appears, Abdul Salam as well as his counsel were absent. The application was, therefore, heard and disposed of ex parte. The learned Insolvency Judge held that Abdul Salam had transferred all his property in favour of his wife in order to defeat the claims of the District Board. He further held that Abdul Salam was not in a position to pay the amount due to the District Board. The application was allowed on 18-9-1943 and Abdul Salam was adjudged an insolvent.

[3] Against the order of adjudication, Abdul Salam filed an appeal in the Court of the District Judge. Two points were urged in the appeal: (1) That the petition of the creditor, i. e. the District Board was incompetent inasmuch as the act of insolvency on which it was grounded did not occur within three months before the presentation of the petition. (2) That a creditor who files a petition for adjudging his debtor an insolvent

must be a 'creditor' on the date on which the alleged act of insolvency occurred and further that he must also be a 'creditor' when he presents the petition With regard to the first point, the learned District Judge was of the opinion that the period of three months should be counted from the date of registration of the deed and he thus came to the conclusion that the act of insolvency had occurred within three months of the date of the presentation of the petition With regard to the second point, however, the learned Judge was of the opinion that in order to be competent to present the petition, the District Board should have been a 'creditor' of Abdul Salam on the date when the act of insolvency occurred, i e 13 8 1942, when the deed was registered In view of the fact that the appeal of the District Board, reversing the decree in favour of Abdul Salam was allowed on 12 11 1942, the learned Judge came to the conclusion that the District Board was not a 'creditor' of Abdul Salam on the crucial date In this view of the matter, the appeal was allowed and the order adjudging Abdul Salam insolvent was set aside on 28-7-1944 Against this order of the learned District Judge, the District Board, Bijnor, has come up in revision to this Court

[4] In the first instance this application was heard by a learned single Judge of this Court who, in view of the importance of the questions involved and some conflict of authority in other High Courts, has referred it for decision by a Bench of two Judges. We have heard learned counsel for the parties at great length There are two main questions which call for consideration and decision in this case (1) Whether the period of three months provided for by s 9 (1)(c), Provincial Insolvency Act should be counted from the date of the execution of deed, or from the date of registration of the same, (2) whether the debt on which the insolvency petition is founded must be due at the time when the act of insolvency is committed

[5] Before proceeding further, reference might be made here to the relevant provisions of the Insolvency Act (Act 5 [V] of 1920).

"Section 6 A debtor commits an act of insolvency in each of the following cases, namely —

* * * *

(b) if, in British India or elsewhere, he makes a transfer of his property, or of any part thereof with intent to defeat or delay his creditors,

(c) if, in British India or elsewhere, he makes any transfer of his property, or of any part thereof, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent, . . . . . .

Section 9 (1) A creditor shall not be entitled to present an insolvency petition against a debtor unless— (a) the debt owing by the debtor, to the creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to such creditors, amounts

to five hundred rupees, and (b)
dated sum payable either immedi
tain future time and (c) the act of
the petition is grounded has occ
months before the presentation of

Section 54 (1) Every transfer of pr
ment made every obligation incurred
cial proceeding taken or suffered by
to pay his debts as they become due fro
in favour of any creditor, with a vie
creditor a preference over the other cre
such preson is adjudged insolvent on
sented within three months after the d
deemed fraudulent and void as against
and shall be annulled by the Court ;"

[6] With regard to the first que
obvious that the *terminus a quo* fro
the limitation of three months begins
the time when the act of insolvency
The crucial question, therefore, is to de
when exactly the act of insolvency occ
particular case The act of insolvency
in the present case is a transfer of proper
the debtor with a certain intent The qu
at issue, therefore, resolves itself into the
tion when exactly the transfer of property
place Here a written deed of sale was execu
on 3 7 1942, but as the property involved w
worth more than Rs 100, the deed cou
operate as an effective sale deed only when
was registered Till registration it could no
have any legal effect as a sale deed This is
clear from the provisions of S 49, Registration
Act read with S 54, T P Act. It follows
that title to the property does not pass so
long as registration is not effected The 'trans
fer of property' therefore occurs only when—
and not till then—registration is effected The
crucial event on which the transfer of property
hinges is therefore the fact of registration Ad
mittedly the registration in the present case
was effected on 13 8 1942 In our judgment,
therefore, *the point of time* when the transfer
took effect is *the point of time* when the
event of registration occurred which caused
the transferee to become the owner of the pro
perty. Learned counsel for the opposite party
has drawn our attention to the provisions of
S 47, Registration Act That section provides

47 A registered document shall operate from the
time from which it would have commenced to operate
if no registration thereof had been required or made,
and not from the time of its registration

[7] Learned counsel contends that in view
of the provisions of this section, as soon as regis
tration was effected on 13 8 1942, the sale deed
executed on 3 7-1942 became operative and legal
ly effective from 3 7 1942 There is no doubt
that this proposition is well founded, but in the
present case, we are not concerned
question of the 'operation'
but with *the point*

Edn. 15 (1937) p. 47, the law on the point is stated thus:

"By the so-called Common Law of Bankruptcy, it has always been held that the petitioning creditor's debt must have accrued due before the act of bankruptcy on which the petition is founded: (1808-16) 1 Camp. 489;[15] further, the debt must be a liquidated debt, though not necessarily payable *in praesenti*, before the act of bankruptcy—it is not enough that it became liquidated after the act of bankruptcy and before the petition. (1927) 1 Ch. 19,[16] but the debt need not have been due to the petitioning creditor at the date of the act of bankruptcy. Thus, if the debt be on a bill of exchange accepted before the act of bankruptcy, it is not necessary that it should have vested in the petitioning creditor before the act of bankruptcy ...... A bill of exchange accepted before the act of bankruptcy, but not issued until after it, will not support a petition: *vide* (1870) 6 Ch. A. 546[17] ...... It is submitted that this is still the law."

[15] The above statement of the law in William's well-known text book has received the approval of the Court of Appeal in England in (1927) 1 Ch. 19.[16] In Ringwood's Principles of Bankruptcy (1930), 16th Edition, at page 40, the law on the point is thus stated:

"The petitioning creditor's debt must have existed at the time of the act of bankruptcy; but if there was a good petitioning creditor's debt at that time it is immaterial that judgment has been subsequently obtained for it."

The *reason* for the rule is thus stated in the leading case in (1870) 6 Ch. A. 546[17] at page 549, by Mellish L. J.:

"It has always been the settled rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy. The law was so settled, not on the ground of any express words in any of the Bankruptcy Acts, but because *it would be manifestly unjust that a person who commits an act of bankruptcy, and who happens to have no creditors, or pays all his creditors in full*, should be liable to be made bankrupt on account of that act by some person to whom he afterwards becomes indebted."

And it is further clear that a man who is the only creditor of a debtor can present a bankruptcy petition against him: *vide* Halsbury's Laws of England, Hailsham Edition, Vol. 2, P. 54 and (1889) 24 Q B.D. 71[18] (per Lindley L. J. at p. 76).

[16] Sir Dinshah Mulla in his well-known book on the Law of Insolvency in British India, 1930 edition at p. 117 has stated the law thus :

The petitioning creditor's debt must have existed at the time of the act of insolvency. It must also have existed at the time of the presentation of the petition, and must have continued to exist at the hearing and down to the making of the order of adjudication. If there was a good petitioning cerditor's debt at the time of the act of insolvency, it is immaterial that judgment has been subsequently obtained for it and it has become merged in the judgment."

Similarly, in the Encylopaedia of the General Acts and Codes of India, Vol. 1 at pages 167 and 250, the law is thus stated :

"The petitioning creditor's debt must have been subsisting when the act of insolvency was committed : (1808-16) 1 Camp. 489[15] and (1871) 6 Ch. A. 546.[17]

In view of the authorities mentioned above, it must be held that the word "creditors" as used in Sections 6 (b), 7, 9 (1) and 54, Provincial Insolvency Act does not include a person who becomes a creditor of the insolvent after the date of the transfer or other act of insolvency. It follows, therefore, that the District Board, the applicant in this case, which became a creditor of Abdul Salam only when the appeal was allowed and the suit dismissed on 12-11-1942 was not competent to file the petition on 13-11-1942. The result, therefore, is that the application in revision is dismissed with costs.

G.N. *Application dismissed.*

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## A. I R. (34) 1947 Allahabad 388 [*C. N. 145.*]

SINHA J.

*Ram Sahai—Defendant—Appellant v. B. Hari Shanker and another — Plaintiffs—Respondents.*

Second Appeal Nos. 1166 and 1574 of 1944, Decided on 29-11-1946, from decision of Addl. Civil Judge, Bulandshahr, D/-18-3-1944.

Custom—Landlord and tenant—Right of transfer—Restraint.

Where a custom depriving a *ryot* of his absolute right of transfer is pleaded to prevail in a part of a town, judicial decisions constitute the most satisfactory evidence of it: 26 A.I.R. 1939 P.C. 22. *Ref.* [Para 10]

According to the custom prevalent in Sarai Goshain, which forms part of the town of Bulandshahr (U.P.) a ryot has no right to sell his interest in land without the knowledge of his landlord. [Para 13]

*Case referred :—*

1. ('39) 1939 A. L. J. 264 : 26 A. I. R. 1939 P.C. 22 : I. L. R. (1939) Kar. 93 : 179 I.C. 620, Ajai Verma v. Mt. Vijai Kumari.

*C. B. Agarwala—for Appellant.*

**Judgment.** — These are two appeals by the defendants and arise out of two suits for possession. The property in dispute consists of two plots Nos. 1175 and 1177. Plot No. 1175 is a compound known as Narotamwala. The plaintiffs claimed to be their owners. Their case is that a portion of the land was sold by the plaintiffs, but the bulk of it still remains with them. The complaint is that Tullan, son of Kundan and grandson of Narotam, occupied a house as their ryot, but sold it, without any right, on 14-8-1938, to the defendant, Ram Sahai, without their knowledge. They claimed possession of the land on the ground that, according to the custom prevalent there, the transaction was not permissible. The defence was that there was no such custom and that Tullan had an absolute right of transfer. This was suit No. 451 of 1941. The connected suit against Chhote was brought on similar allegations and was resisted on similar pleas.

[2] The property in dispute lies in a part of the town of Bulandshahr, known as Sarai Goshain. The learned Munsif found that the

plaintiffs had failed to prove that the plots in dispute lay within their land or that they were their owners He also found that the custom pleaded by the plaintiffs did not exist In the result, he dismissed both the suits

[3] On appeal, the learned Additional Civil Judge disagreed with the learned Munsif on both the points He found that the plots in dispute lay within the ambit of the plaintiffs proprietary rights He also found that the custom prevailed in the locality The defendant has come to this Court in second appeal

[4] I have heard the learned counsel for the appellant at great length and have given my anxious consideration to the case I have come to the conclusion that the judgment under appeal is correct and must stand

[5] Bulandshahr is one of the towns in these provinces Sarai Goshain was founded about two hundred and seventy years ago The learned Munsif found that it is not an agricultural village and has all the appearances of a mohalla inhabited by lawyers, doctors and others, who flourish in a town or a city He also found that this mohalla was never distinct or separate from the town of Bulandshahr He further found that Bulandshahr itself was converted into a municipality in the year 1866 These were the reasons which weighed with him in coming to his conclusion that such a custom could not prevail in the particular area

[6] The learned Additional Civil Judge, however, found that, in view of the entry in the *wajib u larz* and in view of a number of judgments on the record, the custom must be deemed to be established I have no doubt in my mind that his conclusion is correct

[7] The *wajib ul arz* consists of three sections The first relates to houses belonging to ancient owners, the second to *ryots* settled by zamindars or inns and miscellaneous houses, the last portion deals with the resumed muafi, ul, etc, etc

[8] It appears to me that the trial of the case proceeded on the assumption that the house in dispute fell in the second category and it is not open to the learned counsel for the appellant to go back on that position

It is contended by him that it was admitted by the plaintiff in his deposition that the area in question was never separate from the town of Bulandshahr and it was not open to the lower appellate Court to spell out a new ... I shall assume that he is right and the description of the place given by the learned ... is a true description I, however, feel ... judgments hold the field Not by mere ... ons raised by the physical features, or geography of the place, could the scale be turned in favour of the defendant ... should have led positive evidence, but this he failed to do

[10] It cannot be denied that judicial d... sions constitute the best evidence in a case ... such a character In Roy's Customs and Customary Law in British India (1911) at page 5...it is said

> Though judicial decisions are not necessary for the establishment of a custom yet they are certainly the most satisfactory evidence of it Instances of an enforcement of a custom are good evidence

Indeed their Lordships of the Judicial Committee in a case which went from this Court, 1939 A L J 264,[1] have gone the length of holding that "the proof of actual instances of such a custom taking effect is not necessary"

[11] The plaintiffs in this case stand on surer ground by placing before the Court a large number of instances in which the custom pleaded by them has been recognised in judicial decisions

[12] It is not necessary to deal with all the judgments on the record I shall allude to just a few They range from a period between 1906 and 1941 The first judgment is of 28 11 1906 It is a judgment by a Munsif It was a case of a sale by a ryot in this very mohalla The second is a judgment of 4 3 1908 It is again a case of a sale The third is a judgment of 17 2 1920 The facts of the case do not seem to be clear, but the trend of the judgment indicates that the custom was upheld The last judgment is of 30 3 1936

[13] I have made no reference to a number of other judgments, which deal with the question of abandonment, inasmuch as the learned counsel for the appellants contends that they cannot afford a proper guide for the determination of the question in hand, although the contention does not necessarily command my assent The area in dispute may not be an agricultural area, but the question still remains whether it possesses some of the incidents of an agricultural village, one of them being prohibition against transfer by a ryot The instances which deal with the case of a transfer by a ryot are quite enough to establish the custom I am of opinion that, if there were no other evidence on the record than the judgments referred to, which are all in favour of the custom, the plaintiffs must be deemed to have discharged the burden of proof. As against this the defendants have, as I have already said, nothing to fall back upon except presumptions

[14] I think the view taken by the Court below is right and I dismiss the appeals, but, as the respondents have not entered appearance, I make no order as to costs Leave to appeal under the Letters Patent is refused

V B B

——— *Appeals dismissed*

he had paid as consideration for the sale deed. Mr. Kotwal for the respondent has referred to the case in A. I. R. 1936 Nag. 268[2] in which it is held that where a transaction is set aside under S. 53, T. P. Act, the transferee is entitled to the return of the sale price, but is not entitled to the costs of defending a suit against the transferor's creditors. Commenting on this decision on p. 350 of his Indian Contract Act (Edn. 7), Sir Dinshah Mulla says in the footnote that it appeared from the report that the transferee was a party to the fraud of defeating and delaying creditors and that if so, he was not entitled to any relief. A similar observation is to be found in various decisions, like 39 Bom. L. R. 1124.[3] Obviously S. 65 does not apply to agreements which are void *ab initio*, and still less to those which are tainted with fraud or other moral turpitude, and there is no section in the Act under which money paid for an unlawful purpose may be recovered back.

[5] There is a distinction between setting aside a transfer under S. 53, T. P. Act, and setting aside a transfer under S. 54, Provincial Insolvency Act. In the former case, the transfer is voidable and can be avoided at the instance of a creditor if it is proved to have been intended to defeat or delay the creditor, whereas in the latter case, if an application for insolvency is made within three months after the transfer, such transfer is void, if it is intended to defeat or delay the creditor, and not merely voidable, and as soon as it comes to the notice of the receiver it shall be annulled. Hence a transfer under such circumstances cannot be said to be discovered to be void or said to become void within the meaning of S. 65, Contract Act. I, therefore, hold that so far as Rs. 7000 paid in cash at the time of the execution of the sale deed are concerned, the respondent cannot prove his debt and cannot seek to have his name entered for that amount in the schedule of creditors.

[6] The case of the amount of past debt stands on a different footing. There is no allegation that the antecedent debt mentioned in the sale deed was tainted, and when that debt was advanced there was no idea of committing any fraud on the other creditors. Where an alienation effected by an insolvent is set aside on the ground of fraudulent preference, it is open to the alienee to prove as an unsecured creditor his just antecedent debts which were in existence before the fraudulent transfer was thought of but which were fraudulently included in the consideration for that transfer. In (1908) 1 K. B. 941[4] it was held that a creditor could not prove in bankruptcy for money paid by him to the insolvent in the course of carrying out a transaction devised in fraud of the general body of creditors. But as pointed out by Le Rossignol J. in A. I. R. 1919 Lah. 211[5] that decision was based upon the principle that no Court would grant relief, which reposed on a fraudulent transaction, but as the antecedent debt was not advanced for the purpose of any fraudulent transaction, the mere fact that it was included as consideration for a subsequent fraudulent transaction cannot debar the applicant from claiming to prove that debt and be recognised as an unsecured creditor to that extent. The Madras High Court also has taken a similar view in A. I. R. 1926 Mad. 672[6] and I respectfully agree with it. For these reasons, I modify the decree of the lower appellate Court by confirming the remand for proving the claim only in respect of the antecedent debt and not in respect of the cash amount which was claimed to have been paid as consideration at the time of the execution of the sale deed. As both the parties have partially succeeded in this Court and in the lower appellate Court, I order that they should bear their own costs throughout.

R.G.D. *Order accordingly.*

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## A. I. R. (34) 1947 Bombay 394 [C. N. 112.]

LOKUR J.

*Manilal Ratanchand Shah — Defendant — Appellant v. Nanubhai Jesingbhai and others — Plaintiffs — Respondents.*

Second Appeal No. 653 of 1943, Decided on 6-12-1945, *from decision of District Judge, Ahmedabad, in* Appeal No. 251 of 1943.

(a) Specific Relief Act (1877), S. 54—Co-owners.

One co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights, absolutely, and without reference to the amount of damages to be sustained by the one side or the other from the granting or withholding of the injunction : 14 Cal. 189, *Foll.* [Para 2]

A lane measuring 48 feet x 5 feet belonged jointly to *A* and *B* and was used as a passage for going to the latrines. *B* wanted to put up a balcony projecting 2 feet 9 inches into the lane at a height of 14 feet 10 inches from the ground. In a suit by *A* for an injunction restraining *B* from constructing the balcony, there was no allegation that the balcony would in any way interfere with the enjoyment of the lane :

*Held* that the injunction against *B* should be limited to exceeding the projection of the balcony beyond two feet into the common lane : S. A. No. 631 of 1936; *S. A. No. 579 of 1935 and* 17 A. I. R. 1930 Cal. 341, *Ref.* [Para 3]

(b) Evidence Act (1872), S. 21 — Admission in one's own favour has no evidentiary value. [Para 1]

(c) Civil P. C. (1908), S. 100 — Finding as to ownership of property is a finding of fact. [Para 1]

('44-Com.), C. P. C., Ss. 100 and 101, N. 37, Pt. 18.

*Cases referred* —

1 Second Appeal No 631 of 1936 Decided by Sen J on 17th March 1939 Ranchhodbhai Vallavbhai v Patel Dahyabhai

2 Second Appeal No 579 of 1935 Decided by Wassoodew J, on 24th March 1938 Kandoi Jhaverdas v Master Mahomed Ibrahim

3 (86) 14 Cal 189 Shamnugger Jute Factory Co v Ram Narain Chatterjee

4 (30) 57 Cal 92 17 A I R 1930 Cal 341 125 I C 665 Akshay Kumar v Bhajagobinda Shaba

*K T Pathak* — for Appellant

*J C Shah and M H Chhatrapati* — for Respondents

**Judgment** —This appeal arises out of a suit filed by the plaintiffs to obtain various injunctions in respect of a chhindi or lane to the north of defendant 1's house The plaintiffs claimed that the said chhindi was of the joint ownership of themselves and defendants 1 and 3, whereas defendant 1 contended that he was the sole owner of the chhindi He opened doors and windows in the northern wall of his house abutting on the chhindi and also threatened to put up a balcony projecting 2 feet 9 inches into the chhindi at a height of 14 feet 10 inches from the ground The plaintiffs prayed for an injunction requiring him to close the openings in his northern wall and restraining him from constructing the said balcony The trial Court held that the chhindi belonged jointly to the plaintiffs and defendants 1 to 3 and granted an injunction restraining defendant 1 from projecting his balcony on the northern side of his wall beyond two feet into the chhindi. The reliefs in respect of the doors and openings in the wall were refused Defendant 1 appealed to the District Court and the plaintiffs put in cross objections The learned District Judge confirmed the findings of the trial Court, but came to the conclusion that even a balcony extending to two feet into the chhindi would be an ouster of the joint owners and issued a general injunction restraining defendant 1 from constructing any balcony overhanging the chhindi in suit The cross objections filed by the plaintiffs with regard to the doors and openings were dismissed The decree of the trial Court was modified accordingly, and defendant 1 has appealed against that decree The plaintiffs have also put in cross objections in this Court regarding the doors and openings in the northern wall of defendant 1's house but they were not pressed As regards the ownership of the chhindi, the evidence both oral and documentary, has been fully considered by the Courts below, and the finding that it belongs to the plaintiffs and defendants 1 to 3 is a finding of fact which is based on good evidence and has to be accepted in second appeal. It is true that in several title-deeds of defendant 1 the chhindi is described as appertaining to defendant 1's house But that is an admission in one's own favour which has no evidentiary value The main defence of defendant 1 rests upon the so called copy of the partition deed in which the house together with the chhindi was allotted to his share But it is not a certified copy and it does not purport to bear any signature No explanation is offered why the original of the partition deed is not produced Both the Courts below have rightly held that document to be inadmissible in evidence and refused to rely upon it In the city survey record the chhindi is shown as of joint ownership Although it cannot be treated as a document of title, yet in the absence of any evidence to throw doubt upon the entry the Courts below were right in accepting it as correct and in holding that the chhindi is not owned exclusively by defendant 1

[2] The only other question argued in this Court is the projection of a balcony which defendant 1 wants to put up outside the northern wall of his house projecting into the common chhindi He intended to have a balcony of 2 feet 9 inches in width but the learned trial Judge has allowed him to extend it only two feet into the chhindi observing that

> By such projections there would not be any ouster of co-tenants from the air space occupied by the projections and that such projections would not be inconsistent with the joint ownership and possession of the ground underneath if the balcony would be allowed to project on the chhindi to the extent of two feet only as such projection would be the normal use of the air column over the chhindi and would not be inconsistent with the joint ownership of the chhindi.'

The learned District Judge observed that there was no decided case on the subject to the effect that a co-owner could construct a balcony over hanging a common chhindi and that the construction of such a balcony would be an ouster of the other co owner's right to use the column of air situate on the land of the entire chhindi There are, however, two unreported cases of this Court dealing with this subject In S A No 631 of 1936[1] where the balcony covered the entire width, Sen J thought it a proper case for restraining the construction of such a balcony by an injunction He observed

> '... it is admitted that both the parties are joint owners of this plot of land and I think that it would be restricting the claim of the plaintiff unduly to hold that he claims only the right of passage through it and nothing more *Prima facie* therefore the plaintiff has the right, though he has not so far exercised that right, to the whole aerial column above the land in question as a tenant in-common with the defendants and as the balcony covers the whole breadth of the area, there is *prima facie* an ouster of the plaintiff to that extent . The defendants are asserting their sole title to the entire column of air above the ... [illegible]"

In S. A. No. 579 of 1935,[2] where the balcony did not cover the whole of the common street, Wassoodew J. refused to grant an injunction, observing:

"In this case it is not suggested that the defendants' act in projecting the balcony would be inconsistent with the continuance of the joint ownership and possession of the ground underneath. The height of the balcony is about 12 to 14 feet above the level of the common ground, and its projection, as I have said, is only 18 inches, beyond the limits of the defendants' land. If there is no allegation and proof that such projection would cause material discomfort to the other owners, or would be an obstruction or a hindrance to the common use of the land, it was wrong to imagine a grievance which in fact did not exist, or rather which was not supported by the evidence. There must be clear evidence of ouster amounting to a trespass which would justify the interference of the Court in a case of this kind."

These facts are similar to the facts of the present case. The granting of injunctions is regulated by Ss. 54 and 55, Specific Relief Act, and it is entirely in the discretion of the Court, though the discretion is to be sound and reasonably guided by judicial principles. There are cases in which a perpetual injunction is granted against a co-owner when he threatens to commit a trespass upon the common property for his own benefit. But, as held in 14 Cal. 189[3] no decision has gone so far as to establish the broad proposition that

"one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights, absolutely, and without reference to the amount of damages to be sustained by the one side or the other from the granting or withholding of the injunctions."

[3] In the present case although the balcony proposed to be put up by defendant 1 overhangs the common chhindi there is no question of his sole occupation so as to deprive the plaintiffs' enjoyment of the existing actual user of that chhindi. The plaintiffs have not alleged that the balcony would in any way interfere with their enjoyment of the chhindi. It is clear from the plan that the chhindi is used only as a passage by the neighbours for going to the latrines and a balcony at a height of more than 14 feet from the ground is not likely to interfere with the user of the chhindi in any manner. As observed in 57 Cal. 92[4] even the sole occupation of the common property by itself is not ouster unless it is attended by an assertion of a hostile title and unless ouster causes some difficulty or inconvenience to the other co-owners, a Court of law will exercise its discretion in not granting a perpetual injunction. I, therefore, hold that the injunction issued against defendant 1 should be limited to exceeding the projection of the balcony beyond two feet into the common chhindi, as decreed by the trial Court.

[4] For these reasons, I allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court. Parties shall bear their own costs throughout. Cross-objections are dismissed. Parties to bear their own costs.

V.B.B. *Appeal allowed.*

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## A. I. R. (34) 1947 Bombay 396 *[C. N. 113.]*

DIXIT J.

*Sundrabai Sonba Tendulkar—Plaintiff—Appellant* v. *Ramabai Jayaram, Defendant 1 and another — Respondents.*

Second Appeal No. 292 of 1944, Decided on 2nd August 1946, from decision of Dist. Judge, Ratnagiri, in Appeal No. 202 of 1943.

**Transfer of Property Act (1882), Ss. 3 and 123—Gift deed—Attestation—Sub-registrar and identifying witness as attesting witnesses.**

The signature of the Sub-Registrar or of the identifying witness at the time of registering the document is not sufficient attestation as required by S. 123 : 16 A.I.R. 1929 Mad. 1 (F.B.), *Dissent.*; 19 A.I.R. 1932 All. 527 (F.B.); 23 A. I. R. 1936 Bom. 94 and S. A. No. 496 of 1941, *Rel. on.* [Para 10]

Even assuming that he may be an attesting witness, it is necessary to prove that the other essentials of attestation have been complied with. The endorsement by itself is not sufficient to prove due attestation within the meaning of S. 123 : 26 A.I.R. 1939 P. C. 117, *Rel. on.* [Para 11]

Where it was not proved that the identifying witness had seen the executants put their thumbs when they executed the gift deed, it was held that the signature of the identifying witness did not amount to a valid attestation of the gift deed. [Paras 11, 12]

('45-Com.) T. P. Act, S. 3, N. 19.

*Cases referred :—*

1. ('32) 54 All. 1051 : 19 A. I. R. 1932 All. 527 : 139 I. C. 1 (F.B.), Lachman Singh v. Surendra Bahadur Singh.
2. ('29) 52 Mad. 123 : 16 A. I. R. 1929 Mad. 1 : 116 I. C. 367 (F. B.), Veerappa Chettiar v. Subramania Ayyar.
3. ('35) 37 Bom. L R. 913: 23 A. I. R. 1936 Bom. 94: 161 I. C. 374, Harkisandas v. Dwarkadas.
4. S. A. No. 496 of 1941, D/- 28th July 1943 by Lokur J., Timmavva v. Channavva.
5. ('39) 41 Bom. L. R. 1047 : 26 A.I.R. 1939 P.C. 117: I.L.R. (1939) Kar. P.C. 222: 181 I.C. 216 (P.C.), Surendra Bahadur Singh v. Behari Singh.

*B. Moropant and D. V. Dharap* — for Appellant.
*T. N. Walawalkar* — for Respondent 1.

**Judgment.**—This appeal raises a pure question of law and the suit giving rise to the appeal was filed under the following circumstances.

[2] The property in suit, which consists of 16 parcels of land with a house standing [illegible] them, belonged to one Jayaram, husband of defendant 1. He had no issue, had grown old and was in indifferent health. Sundrabai (the plaintiff) appears to be related to Jayaram. The plaintiff's husband Sonba was doing business in Bombay. Jayaram appears to have pressed Sonba and his wife to go to, and stay with, him in order to manage Jayaram's property.

[3] On 15th August 1938 Jayaram and his wife Ramabai (defendant 1) passed in favour of the plaintiff a deed of gift of his property

[4] Subsequently disputes seem to have arisen between the plaintiff and defendant 1 Jayaram having died some time after the deed of gift The plaintiff relying upon the gift filed in 1941 the present suit against defendant 1 and her tenants (defendants 2 to 7) asking for possession of some of the lands and constructive possession of others. There was also a prayer for injunction

[5] Defendant 1 who was the main contending defendant admitted the execution of the deed of gift but she contended that the deed was passed in the circumstances which rendered the gift deed void and that as the gift-deed was attested by only one witness it had not complied with the provisions of S 123 T P Act and the same could not be enforced

[6] The learned trial Judge raised several issues two of which need be noticed in this place The first issue was

> Does defendant 1 prove that the signatures of herself and her husband on the gift deed were taken in the circumstances alleged? Is not the gift deed properly attested?

and he answered the issue by saying that defendant 1 did not prove the same, and on the second part of the first issue he held that the gift-deed was not attested as required by S 123 T P Act The second issue was If so, can the gift-deed be acted upon and would it be binding on defendant 1?' and he answered the issue by saying that the gift-deed was not binding and not operative In view of that conclusion of his, he dismissed the plaintiff's suit and on appeal by the plaintiff, that decision was confirmed The [illegible]

as required by law The plaintiff appeals

[7] It is argued on behalf of the plaintiff that the lower Courts were wrong in holding that the document was not attested by two witnesses as required by law

[8] Before dealing with this question I will turn to the material parts of the deed of gift In this appeal we are not concerned with any question about the true construction of the document We are only concerned with the question as to whether the document was duly attested It is therefore best to begin with the concluding part of the document The deed of gift is written by Shivram Sakharam Kubal inhabitant of Vengurla, to-day at Parule" Then there is a place for attestation and one of the attestors is Laxman Jagannath Samant. There is a line for another attestation but there is actually no attestation. Then there are the signatures that is to say the mark of the left hand thumb of Jayaram as also the mark of the left hand thumb of Ramabai, both the signatures being written by Laxman Jagannath Samant Below that is this statement

Received private attendance fee of Rs 10 ten only on 13th August 1938 and credited to Government on the same date Below that appear (1) thumb mark, (2) thumb mark apparently of Jayaram and Ramabai without having been so described And just above these two thumb marks is the statement that

[illegible]

There are words with a rubber stamp हा दस्त ऐवज करून देणारा हा दस्त ऐवज करून दिल्याचें कबूल करतात '

Below these two thumb marks this is what is stated

> Hari Dadaji Desai (occupation) agriculture (residing) in Parule is known to the Sub Registrar and states that he personally knows the executants Nos 1 and 2 of the above document and identifies them

Then follows the signature of Hari Dadaji Desai and the date and below that is the signature of the Sub Registrar Vengurla and then there is the recital Registered under No 262 at pp 184 to 190 of Vol 221 of Book No 1, dated 22nd August 1938 Sub-Registrar Vengurla It is in relation to this document that I have to decide as to whether the document can be said to be duly attested

[9] Now the gift in order to be valid must conform to the provisions of S 123, T P Act It provides that

> For the purpose of making a gift of immovable property the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses

Therefore the three requirements to constitute a valid gift are (1) due execution, (2) due attestation and (3) due registration The expression "attested is defined in S 3 of the Act In this connection it will be helpful to con[illegible] the material portion of the oral evidence [illegible] Ramabai (Ex. 38) in her evi[illegible] Sonba told her that the deed [illegible] and asked to put her thum[illegible] (Ex. 40) in her eviden[illegible] was executed in the [illegible] Sub-Registrar [illegible] ing of the gi[illegible] her, [illegible] thumb[illegible] [illegible]

Saswadkar, that the witness wrote the deed at the dictation of Ramabai and Jayaram, that Jayaram and Ramabai put their thumb-marks on Ex. 39 in his presence, that the thumb-marks were attested by one Laxman Jagannath Samant in his presence and that Laxman Jagannath also signed Ex. 39 as a witness in his presence. It may be noted that this witness does not refer to the presence at this stage of Hari Dadaji Desai. Then the evidence of the attesting witness Laxman Jagannath Samant (Ex. 18) is this. He says that Ramabai and Jayaram had passed it to Sundrabai, that Ramabai and Jayaram had put their thumb-marks on the gift-deed in his presence, that he had attested the thumb-marks as asked by Jayaram and Ramabai and that he had also signed on Ex. 39 as an attesting witness. It may again be noted that at this stage he does not refer to the presence of Hari Dadaji Desai. Then the evidence of Hari Dadaji Desai (Ex. 41) is this. He says that he knows Sundrabai and Ramabai and knows Jayaram, and that Jayaram and Ramabai have put their thumb-marks on Ex. 39. It is apparent from what I have said above that the only person who had signed as an attesting witness is Laxman Jagannath Samant and the place for the second attestation is left blank. Learned counsel for the appellant concedes that Laxman Jagannath Samant is the only attesting witness. But it is said that the Sub-Registrar must be considered to be an attesting witness and further that Hari Dadaji Desai, an identifying witness, must also be considered or deemed to be an attesting witness. In the present case the Sub-Registrar has not been examined. Hari Dadaji Desai has been examined and his evidence I have already referred to. Now, after the document is executed, at the time when it is to be presented to the Sub-Registrar certain formalities have got to be observed. This refers to an inquiry before registration by a registering officer which is indicated in S. 34, Registration Act, 1908. According to S. 34 (3) (b) the registering officer shall satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and after he is so satisfied the Sub-Registrar has then to follow the procedure laid down in Ss. 58 and 59, Registration Act. Section 59 refers to the particulars to be endorsed on documents admitted to registration. And S. 59 provides:

> "The registering officer shall affix the date and his signature to all endorsements made under Ss. 52 and 58, relating to the same document and made in his presence on the same day."

[9a] Now, in the present case, Hari Dadaji Desai appears only as an identifying witness and the document shows that he had identified the executants. His signature appears just below the two thumb-marks made by Jayaram and Ramabai when they admitted the execution of the document. It does not appear from the evidence that Hari Dadaji Desai was present when Laxman Jagannath Samant, the attesting witness, attested the document. The question then is whether Hari Dadaji Desai can be regarded as or can be deemed to be an attesting witness. As the Sub-Registrar has not been examined, it is, I think, unnecessary to consider whether the Sub-Registrar can be regarded as an attesting witness, assuming that he can be so regarded in law. On the face of the document, the document appears to have been attested by only one attesting witness, and the requirement of S. 123, T. P. Act, is not clearly fulfilled. But if the Sub-Registrar and Hari Dadaji Desai can be regarded as or can be deemed to be attesting witnesses, as learned counsel contends, then it is clear that the document can be said to have been properly attested. But for reasons, which I am about to mention, neither the Sub-Registrar nor Hari Dadaji Desai can, in this case, be regarded as attesting witnesses. As I have already said, S. 123, T. P. Act, contemplates three things: (1) due execution, (2) due attestation and (3) due registration. In the present case there is no dispute as regards the first and the third requirements. The point at issue is with respect to the second requirement; and if due execution and due attestation must precede due registration, then it is not possible to hold that the Sub-Registrar and the identifying witness can properly be regarded as attesting witnesses. Besides, when a witness attests a document, he does so with the consciousness that he witnesses the execution of a document. In the present case having regard to the evidence, to which I have already referred, the only attesting witness, when the two executants affixed their signatures, was Laxman and so, apart from authority, I hold that Hari Dadaji cannot be said to be an attesting witness so as to comyly with the provisions of S. 123, T. P. Act.

[10] However, the view which I take in the matter is supported by authority. It has been so held in a decision of the Allahabad High Court in 54 ALL. 1051.[1] The headnote in that case is as follows:

> 'The signatures of the Sub-Registrar and of the witnesses identifying the executant at registration are not sufficient attestation of a mortgage deed for the purposes of the Transfer of Property Act, even assuming that the Sub-Registrar and identifying witnesses did receive from the executant a personal acknowledgment of his signature or mark, and that they did sign in the executant's presence.
>
> The mere fact that a person sees, or receives an acknowledgment of, the execution of a document and signs it does not make him an attesting witness, unless he signs with the idea of bearing testimony to the execution

and with the idea further of permitting himself to be cited as a witness to prove the execution

Although the registering officer receives a personal acknowledgment from the

Learned counsel has relied very strongly upon the case in 52 Mad 123[2] This case has been referred to in the Full Bench decision of the Allahabad High Court, to which I have just referred and the Full Bench did not approve of the principle laid down in 52 Mad 123[2] In this Court there is a decision reported in 37 Bom L R 913,[3] which shows that this Court followed the decision in 54 ALL 1051,[1] in preference to the decision in 52 Mad. 123[2] And there is one more decision (unreported) in S A No. 496 of 1941[4] Lokur J after noticing the conflict of authority agreed with the view taken in 37 Bom L R 913[3] which accepted the view taken in 54 ALL 1051[1] in prefer

But assuming that the signatures constitute due attestation, I may now refer to a decision of the Privy Council in 41 Bom L R 1047[5] A part of the headnote in that case is worth quoting

Assuming that it would be legitimate to look at the proceedings relating to the registration of a mortgage deed for the purpose of proving the due execution and attestation thereof it is necessary in order to comply with the provisions of the Transfer of P to prove

... which are endorsed on documents which are admitted for registration under S 58 Registration Act 1908 do not include statements as to the aforesaid facts which are necessary for proving the due attestation of a mortgage deed according to the provisions of the Transfer of Property Act '

The case in 54 ALL 1051[1] was a case relating to a mortgage and the present case deals with a deed of gift But there is no difference between Ss 58 and 123 on the question of due attestation It may be mentioned that in that case their Lordships of the Privy Council did not actually settle the conflict between the decision in 54 ALL. 1051[1] and the decision in 52 Mad 123[2]

... p 1054 this is what is stated .

'If it had been intended to rely on the proceedings of the registration as showing that the provisions of the Transfer of Property Act as to due execution and attestation of the mortgage deed were complied with evidence should have been given on behalf of the plaintiff to prove the necessary and material facts "

So that the endorsement by itself is not sufficient to prove due attestation within the meaning of S 123 Evidence must be given to prove the necessary and material facts, and in the present case the Sub-Registrar has not been examined, and though Hari Dadaji Desai has been examined, his evidence does not justify the conclusion that he can properly be regarded as an attesting witness To quote his evidence once again this is what he says

I know Sundarabai and Ramabai and know Jayaram I see Ex 39 Jayaram and Ramabai have put their thumb on Ex 39

Now Jayaram and Ramabai had put their thumbs at two places, first, when they executed the document, and, secondly, when they admitted the execution before the Sub Registrar As to whether the witness refers to the thumbs first put by them or to the thumbs put by the executants when they admitted the execution before the Sub Registrar, the evidence is vague, and I am unable to say that this evidence can properly be interpreted to mean that the witness referred to the thumb marks when the executants executed the document It is to be remembered that Hari Dadaji Desai has signed immediately below the signatures of Jayaram and Ramabai when they admitted the execution of the document before the Sub Registrar, and in these circumstances and having regard also to the evidence of Sundrabai Shivram and Laxman, when Hari Dadaji Desai refers to the thumb marks on Ex 39 he really refers to thumb marks of the executants when they admitted the execution before the Sub Registrar Besides, the learned appellate Judge was not impressed with the evidence of Hari Dadaji Desai This is what he says (p. 2)

Now it does not appear clearly from the evidence of this witness that the two thumb impressions referred to by him were the first two th
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I am ... ferred in some detail to the oral evidence only for the purpose of pointing out the material evidence in the case in order to satisfy myself if Hari Dadaji Desai can properly be regarded as an attesting witness Hari D
does not sa
ted the exec
He merely
have put the ... There is, therefore, no compliance with the require ts of S 123

[illegible] For all these reasons I hold that the document (Ex. [illegible]) has not been attested as required by law.

[illegible] The result is that the appeal fails and must be dismissed.

[illegible] On the question of costs, learned counsel for the appellant says that in the peculiar circumstances of the case there should be no order as to costs. Mr. Walawalkar for defendant 1 objects and I think naturally. The plaintiff fails in this proceeding on a technical point and not on the merits of the dispute. Apparently there has been conflict of opinion between the High Courts on the question raised in the appeal though this Court in 47 Bom. L. R. 918[5] had taken as correct the view propounded in 54 ALL. 1051.[3] However, having regard to the peculiar circumstances of the case the fair order will be that there will be no order as to costs of this appeal.

V.P.F. *Appeal dismissed.*

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## A. I. R. (34) 1947 Bombay 400 [*C. N. 114.*]

LOKUR J.

*Maruti Aba Bongane — Plaintiff — Appellant v. Akaram Pandu More and others — Defendants — Respondents.*

Second Appeal No. 28 of 1944, Decided on 20-3-1946, from decision of District Judge, Satara, in Appeal No. 251 of 1942.

(a) Arbitration Act (1940), S. 30 — Judicial misconduct — Mistake of law visible on face of award — Award in contravention of finding.

Where the award passed by the arbitrator is in direct contravention of the findings arrived at and definitely recorded by him, then the award is illegal on the face of it. [Para 8]

The arbitrator who passes such an award is guilty of judicial misconduct: 14 A. I. R. 1927 P. C. 164, *Foll.* [Para 3]

The deed of reference required the arbitrator to give his decision on the specific points as to who was the reversionary heir or heirs on the death of a Hindu widow *B*, and whether a deed of gift made in favour of *D* by *B* was valid and binding on the reversioners, and then pass an order regarding the possession of the property of deceased *B*. The arbitrator's findings were that *P* alone was the reversionary heir and that *B's* deed in favour of *D* was in accordance with the direction of her husband, but did not say whether it was valid and binding on the reversionary heirs. But in order that there might not be any litigation and needless expenditure, he divided the property among all the parties including persons other than *D* and *P*:

*Held* that the award was in direct contravention of the findings arrived at and definitely recorded by him and as such the award was illegal on the face of it: (1857) 3 C. B. (N.S.) 189; 10 A. I. R. 1923 P. C. 66; 35 Bom. 153 and 8 A. I. R. 1921 Lah. 34, *Ref.* [Paras 3, 8]

(b) Hindu law — Alienation — Gift of undivided coparcenary interest.

According to the Mitakshara law, a coparcener cannot dispose of his undivided interest in coparcenary property by gift. [Para 9]

*Cases referred:—*

1. ('27) 29 Bom. L. R. 1150 : 14 A. I. R. 1927 P. C. 164 : 55 Cal. 126 : 21 S. L. R. 101 : 54 I. A. 427 : 104 I. C. 476 (P.C.), Saleh Mahomed v. Nathoomal.
2. (1857) 3 C. B. (N.S.) 189 : 20 L. J. C. P. 66 : 6 W. R. 181, Hodgkinson v. Fernie.
3. ('23) 50 I. A. 324 : 10 A. I. R. 1923 P. C. 66 : 47 Bom. 578 : 73 I. C. 436 (P.C.), Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co., Ltd.
4. ('10) 35 Bom. 153 : 8 I. C. 647, Sakrappa v. Shivappa.
5. ('21) 2 Lah. 114 : 8 A.I.R. 1921 Lah. 34 : 61 I. C. 628, Dwarka Das v. Krishan Kishore.

*A. G. Desai and V. J. Gharpure*—for Appellants.

*R. A. Jahagirdar* — for Respondent 1.

**Judgment.** — This appeal arises out of a suit for possession of survey No. 758/1 of Uran measuring 10 acres and 8 gunthas and a house in that village which belonged to defendant 1's father-in-law Masu. Masu died in 1907 leaving behind him his widow Bhagu and his son-in-law defendant 1 whose wife Mamata had already died in 1903. On Masu's death his property devolved upon his adopted son Appa. Appa died shortly afterwards and the property went to his mother Bhagu. Bhagu made a gift of 9 acres and 1 guntha out of survey No. 758/1 and the house in favour of her son-in-law defendant 1 in 1909. But she disclaimed that gift by a notice served on defendant 1 in 1916. She died on 3rd May 1939 and disputes arose regarding the heirship to her land and house. Defendant 1 claimed them under the deed of gift executed by her. The plaintiff Aba, who is the son of Masu's cousin Kushaba, claimed the property as the nearest reversionary heir. Defendants 2, 3 and 4 are Aba's nephews and therefore one degree more remote. Still they also put forward their claim to a share in the property along with the plaintiff. All these claimants, therefore, referred their disputes to the arbitration of the Village Police Patil Anna Dada by a deed of reference dated 19th July 1939. The arbitrator gave his award on the very next day and held that the plaintiff was the nearest reversionary heir, that defendants 2, 3 and 4 were not such heirs, and that Bhagu had made a gift of the property in favour of her son-in-law in accordance with the wishes of her husband Masu, but in order that there might not be any litigation and needless expenditure, he divided the property among all the four. The deed of gift passed by Bhagu in favour of her son-in-law included only 9 acres and 1 guntha out of survey No. 758/1, so that it left 1 acre and 7 gunthas untouched. The plaintiff as the nearest reversionary heir became, therefore, entitled to that area. But the arbitrator awarded him two acres. He also awarded 18 gunthas to each of defendants 2, 3 and 4 and the remaining property consisting of 7 acres and 9 gunthas out of survey No. 758/1 and the

family house were awarded to defendant 1 The plaintiff who was not satisfied with the award immediately filed this suit on 23rd August 1939, alleging that the award was illegal on the face of it that his signature on the deed of reference was obtained by fraud, that the award was not binding on him as it was vitiated by fraud, partiality, misconduct and illegal conduct of the arbitrator and that the arbitrator had deliberately ignored his obvious title with the deliberate purpose of favouring the other parties He, therefore, sought to recover possession of the entire property of Masu as the nearest reversionary heir after the death of his widow Bhagu The defendants contended that there was a proper reference of the dispute between the parties to the arbitration of the Police Patil, that no fraud was committed on the plaintiff, that the arbitrator gave a proper hearing and decided the dispute, that his decision was impartial, that his award was valid and binding on the plaintiff and that the plaintiff's suit was not maintainable The trial Court held that the plaintiff's thumb mark was not taken on the deed of reference fraudulently and that the reference was proper But it held that in view of the findings recorded by the arbitrator his award was illegal on the face of it and was therefore not binding on the plaintiff The plaintiff was given a decree for possession of both the land and the house together with mesne profits from the date of suit In appeal, the learned District Judge held that the arbitrator did not go beyond his powers in dividing the property between the parties before him in the way he thought best in their interest and that there was no error or illegality on the face of the award He, therefore, held that the award was binding on the plaintiff and his suit for possession was not maintainable The appeal was, therefore, allowed and the plaintiff's suit was dismissed

[2] In this Court it is urged on behalf of the plaintiff that the arbitrator's award was obviously opposed to the findings recorded by him and was, therefore, illegal on the face of it The deed of reference sets out in detail the matters in dispute between the parties It says that the plaintiff claimed that as he was the nearest relative of Masu and his adopted son Appa, he was entitled to all the property as the nearest reversionary heir on the death of Bhagu who had inherited it from her adopted son Defendants 2, 3 and 4 claimed that the plaintiff was not the sole reversionary heir but they also were reversionary heirs along with him Thus the first question which the arbitrator had to decide was who was the reversionary heir or heirs on Bhagu's death Defendant 1 claimed that although Bhagu had only a widow's interest in the property inherited from her adopted son, yet she made a gift in his favour as ordered by her husband, and as the gift was intended to carry out the wishes of her deceased husband, it was valid and binding on the reversionary heirs This question also had to be decided by the arbitrator before making a final award regarding the property After setting out these matters in dispute the deed of reference proceeded to say

"These are the matters in dispute between the parties You should give your decision after hearing what the parties have to say Your decision will be acceptable to us and we will regard that decision as final"

[3] Thus the deed of reference required the arbitrator to give his decisions on the specific points in dispute between the parties and then pass an order regarding the possession of the property of deceased Bhagu On these points in dispute the arbitrator did record definite findings and by reason of the reference the parties are bound by those findings, which must be regarded as final Those findings are that the plaintiff alone is the reversionary heir that defendants 2 3 and 4 have no interest in the property and that Bhagu passed the deed of gift in favour of defendant 1 in accordance with the direction of her husband The arbitrator does not say whether Bhagu's gift though made in accordance with her husband's wishes is valid and binding on the reversionary heir If it be valid and binding on the plaintiff, then the entire property which was gifted should have been given to defendant 1 and the plaintiff should have been given only the property not comprised in the deed of gift, namely, 1 acre and 7 gunthas out of survey No 758/1, but no part of the property could have been given to defendants 2, 3 and 4 Yet after recording his findings, the arbitrator set them at naught and proceeded to divide the property according to his sweet will with the sole object of pacifying the parties before him lest otherwise they might start a fresh litigation and incur needless expenditure That was not the reference made to him He was authorised by the deed of reference to decide the points in dispute and pass orders regarding the property in accordance with his findings But to record findings in favour of one party and then order delivery of property to some other party is illegal on the face of the award itself and must be regarded as an apparent error in law. In such a case to use the words of Viscount Sumner in 29 Bom L R 1150,[1] where the arbitrator makes a mistake of law visible on the face of his award, he is guilty of "judicial misconduct," and such an award must be set aside

[4] Mr Jahagirdar for defendant 1 relied upon the following observations of Williams J. in (1857) 3 C B (N S) 189[2] (p 202)

[3] A further resolution No. [illegible] of [illegible], appears to make this procedure generally applicable, since it provides:

"The procedure of purchasing on behalf of Government a defaulter's property by offering a nominal bid should be adopted in order to effect a speedy recovery of Government dues, in cases where a real difficulty is experienced in making such recoveries and no purchaser is forthcoming to buy the land. This procedure can, however, be followed only in respect of such Government dues as are recoverable as arrears of land revenue. It should not be adopted except as a last resort when the various remedies for the recovery of the dues have failed or unless it is clear that bidders are deterred from offering bids by other reasons than purely economic considerations."

[4] It is not suggested that either of these two resolutions has been published by Government in any official Gazette, or that any means *exists by which the public had any notice of* them on the date which is material in this case, viz., [illegible], being the *date of the alleged* auction sale. On the other hand, there has been no attempt to keep them secret, since the following passage is to be found in the introduction to Mr. K. S. Gupte's book on the Bombay Land Revenue Code at p. [illegible]:

"Government Resolutions and Orders bearing on the Land Revenue Code were till now confined to the archives of Government offices. But I am glad to take *this opportunity to mention that Government have* recently by their No. 1550-B/25 (R. D.), dated 9th July 1937 kindly permitted me to consult in the Revenue Department of the Secretariat at Bombay, Government Resolutions, etc., relating to the Land Revenue Code *for the purposes of my revised* annotated edition of the Code."

And *in fact one of the resolutions is set out in* Mr. Gupte's book in the edition published in August 1937.

[5] But the question that we have to consider is whether Government has the power under the Bombay Land Revenue Code of 1879 or any other law to do what was done in this case. As it now appears that these sales of the defaulter's property *for a nominal one rupee to an agent* acting on behalf of Government are an established practice, the matter becomes one of considerable importance both to Government and the public and we have reserved our judgment in order to give to this appeal our fullest consideration.

[6] On or about *26-3-1933, one Dhanalal* purchased from *Government at an auction sale the* right to collect certain tolls in the West Khandesh District for the period from 1-4-1933 to 31-3-1934. The sale of this right to levy tolls is perfectly regular and is in accordance with S. 10, Tolls on Roads and Bridges Act, 1875, which section provides *that the lessee of such tolls*

"shall give security *for the due fulfilment of such* conditions, and that all sums payable under the terms and conditions of the lease shall be recoverable as a demand for the land revenue under the law for the time being in force so far as applicable."

*In the case before us the security took the form of a suretyship agreement entered into by* two sureties, one of whom was the appellant. By that agreement the appellant and his co-surety jointly and severally agreed that Dhanalal would pay to Government at the proper times the respective amounts that he had agreed to pay, and further:

"*In case he fails or neglects to do the same in any* way, we both jointly as well as severally bind ourselves, our heirs and the managers and possessors of our estate that we are liable to pay to the Secretary of State for India in Council any amount not exceeding Rs. 7100 that may be fixed by the Collector."

[7] Some difference arose between Dhanalal and Government with regard to the tolls and *Dhanalal did not pay the amounts for which he was liable. Thereafter Government called upon* the appellant as surety to pay. Amongst the various grounds upon which the appellant seeks to recover his property now in the possession of a revenue patil on behalf of Government are two, which it will be convenient to dispose of at this stage. *First, it is said that Government ought not to have called upon the plaintiff to* pay, or at any rate, ought not to have attempted to enforce payment under the suretyship agreement by disposing of the appellant's land before Government had sold or attempted to sell Dhanalal's movable and immovable property. This is a bad point, for a creditor, once the principal debtor has made default, can call upon the surety to pay without having pursued all his remedies against the principal debtor. The second point is that Dhanalal contracted to lease the tolls as agent or attorney for another and not on his own behalf, *though it cannot be disputed that Dhanalal made himself personally* liable to pay. The matter is raised in this way in the plaint. It is said that when Government sought to recover what was due from Dhanalal, Dhanalal denied his liability and stated that he had made the purchase of the *tolls as attorney* for one Hansraj Singh and *that the solvency* certificate required by Government for entering into a contract such as this was the solvency certificate of Hansraj Singh. The plaint continues:

"As a matter of fact, although the particulars mentioned above *were clear from the records of the* Government Officers, still they took from the plaintiff a surety bond for the said Dhanalal as the auction purchaser without in any way *informing him (plaintiff)* about it. In the circumstances stated above, although it was incumbent upon the officers of the Government to furnish proper and full information regarding the real state of affairs, they failed to do so, and on the other hand they misled the plaintiff and took security from the plaintiff as for *Dhanalal in respect of the* Shirpur toll bar. In this way as the agreement relating to suretyship made between the plaintiff and the Government was due to misunderstanding and without

the plaintiff having been informed of the real state of affairs the same will not be binding upon him (plaintiff) according to law "

a power of attorney executed by Hansraj Singh, that the solvency certificate was the latter's, and that it was Dhanalal who produced the solvency certificate which it was thought was in his name Having discussed the matter in some detail, the learned Judge came to the conclusion that, having regard to all the facts, the appellant had failed to prove that Dhanalal offered bids as an agent of Hansraj Singh That finding disposes of the question, but, apart from it, it is clear that Dhanalal made himself personally liable to Government and that for this personal liability the appellant stood surety In my judgment there is no substance in this point

[9] The issues which are, however, of substance have regard to the validity of the alleged auction sale and to the contention of Government that no civil Court has jurisdiction to entertain this suit at all by reason of s 11, Bombay Revenue Jurisdiction Act, 1876, which says

'No civil Court shall entertain any suit against the Crown on account of any act or omission of any Revenue Officer unless the plaintiff first proves that,

[10] In order to determine these issues, it is necessary to consider the course of events in some detail and also certain sections of the Bombay Land Revenue Code, 1879 Government having called upon the appellant to pay, he failed to do so, and pursuant to the conjoint effect of s 10, Tolls on Roads and Bridges Act, 1875, and s 137, Bombay Land Revenue Code he became what the Code describes as, "a revenue defaulter" As such the appellant was liable to be proceeded against under the provisions of chap XI of the Code, in which chapter there is s 150 which, so far as material, provides that an arrear of land revenue may be recovered by sale of the defaulter's immovable property under s 155 of the Code That section and s 167 are in these terms

'*155* The Collector may also cause the right, title and interest of the defaulter in any immovable property other than the land on which the arrear is due to be sold

*167.* Sales shall be made by auction by such persons as the Collector may direct

case of movable property from the latest date on which any of the said notices shall have been affixed as required by the last preceding section "

[11] By s 165 it is provided that where any sale is oredred under the provisions of chap 11, the Collector shall issue a proclamation in the vernacular language of the district of the intended sale, specifying certain particulars, such proclamation being made by beat of drum at the headquarters of the taluka and in the village in which the immovable property is situated By s 166 a written notice of the intended sale and of the time and place thereof has to be affixed at various places including the defaulter's dwelling house Section 172 provides that the party who is declared to be the purchaser shall be required to deposit immediately 25 per cent on the amount of his bid Section 178 is as follows

'At any time within 30 days from the date of the sale of immovable property application may be made to the Collector to set aside the sale on the ground of some material irregularity or mistake or fraud in publishing or conducting it,

but except as is otherwise provided in the next following section no sale shall be set aside on the ground of any such irregularity or mistake unless the applicant proves to the satisfaction of the Collector that he has sustained injury by reason thereof

If the application be allowed the Collector shall set aside the sale and direct a fresh one'

[12] The next section, s 179, provides that on the expiration of 30 days from the date of the sale if no such application as is mentioned in s 178 has been made, or if the application has been made and rejected, the Collector shall make an order confirming the sale, provided that the Collector may set the sale aside notwithstanding that there has been no such application, and s 181 provides for putting the purchaser into possession after confirmation

[13] There is not in India any Act which governs auctioneers or the holding of auction sales with regard to immovable property, nor has any particular custom or usage in relation to such sales been suggested at the bar But sales by auction are well understood and constantly occur and the principles of the English common law are applicable to them in default of any statutory provision

[14] To continue the narration of the facts. On 10th September 1935, the appellant's immovable property was put up for sale by Government in five lots, in the same way and at the same reserves as hereinafter mentioned in respect of the second attempt to sell the property There were no bids and accordingly the sales were postponed On 11th March 1936, a new order for sale was made, and on 18th March a new proclamation was issued giving notice that on 30th April 1936, from 6 A. M to 6 P M. the

[25] Section 11, Bombay Revenue Jurisdiction Act, to which I have already referred, provides that the plaintiff must prove that, "previous to bringing his suit he has presented all such appeals allowed by law for the time being in force as within the period of limitation allowed for bringing such suit it is possible to present." This section must be read in conjunction with S. 203, Bombay Land Revenue Code which provides:

"In the absence of any express provision of this Act, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a revenue officer under this Act, or any other law for the time being in force, to that officer's immediate superior, whether such decision or order may itself have been passed on appeal from a subordinate officer's decision or order or not."

[26] What type of decision or order is it against which there must be an appeal? Can it be that a plaintiff must appeal against every decision and order of a revenue officer against which he either does not or cannot object? The suit which no civil Court shall entertain is a suit on account of any act or omission of a revenue officer, and it must, in my opinion, follow that it is against the act or omission complained of and upon which the subsequent suit is to be grounded that the appeal under S. 203, Bombay Land Revenue Code must take place. In my opinion, a decision or order in respect of which an appeal will lie must be a decision or order of a quasi-judicial character, and one of which the defaulter is given notice. It would not be possible for a defaulter to appeal against an administrative decision of which he had no knowledge, and further the decision or order must be one to which the defaulter in fact objects. Mere administrative or departmental decisions or orders from one revenue officer to another, of which the defaulter has no knowledge or notice, cannot be the subject-matter of any appeal. If these principles are applied to the facts of the present case, the only decisions or orders against which the appellant might have appealed were the order for the issue of a proclamation for sale brought to the appellant's notice by the proclamation of sale itself and the subsequent order for confirmation of the alleged sale. For the reasons stated in disposing of the two preliminary points no valid objection could have been taken to the mere order for a sale. Nor does the appellant in fact complain that there was any irregularity with regard to the proclamation of sale. With regard to the order confirming the sale, such order, even if brought to the appellant's notice or knowledge, of which there does not appear to be any evidence, is not the substance of his complaint. The appellant's complaint is with regard to what happened on 30th April 1936, which was done by the Mamlatdar and the revenue patil acting in conjunction pursuant to the Collector's order of 11th March 1936, which directed:

"If with all his efforts the Mamlatdar fails to secure bidders he should arrange to purchase the whole property of the defaulters for a nominal bid of rupee one only in each case through the Revenue Patil."

[27] It is not suggested that the appellant had or could have any notice or knowledge of this direction nor that he had any knowledge of the Resolutions of Government dated 4th October 1934 and 16th April 1936. In my opinion therefore Government's contention that the civil Courts have no jurisdiction in this case fails.

[28] In the result the appeal must be allowed, the appellant is entitled to possession of his lands and he is also entitled to mesne profits by way of damages for being unlawfully ejected therefrom. We will consider the form of order which is to be made at the conclusion of the judgments.

[29] **Divatia J.** — I agree. The main point arising in this case is that covered by issue 7, viz., "Is it legal for Government to purchase the property on a nominal bid?" The learned Judge below has answered the issue in the affirmative on the ground that it is open to the Government under the Land Revenue Code to buy a property on a nominal bid if there are no bidders at the auction sale. It appears that some persons were present at the time of the auction sale. But it is contended on behalf of the respondent that as there was a conspiracy between the plaintiff, Dhanalal and Hasraj Singh, they did not offer any bid. Government had, therefore, no option except to purchase the property on a nominal bid of one rupee in the name of the revenue patil. For that, reliance is placed on a Government Resolution of 4th October 1934, in which such a procedure as regards the purchase of the defaulter's property by the Collector on behalf of Government on a nominal bid of one rupee was approved. Accordingly, the Collector in the present case directed the Mamlatdar that he should try to secure bidders at the time of the auction if he apprehended that there would be no bidders, and that even if with all his efforts the Mamlatdar failed to secure bidders, he should arrange to purchase the whole property of the defaulters for a nominal bid of rupee one only through the revenue patil. This procedure is, in my opinion, not supported either by the Land Revenue Code or by the rules framed under it. The rules with regard to auction sales are Rr. 127 to 129. They provide that auction sale should ordinarily be conducted in the town or village in which the land is situated and that an upset price shall, if the

Collector thinks fit be placed thereon There is no rule laying down the procedure as to what should be done when there were no bidders Presumably therefore the sale should be postponed and another auction sale should be held, but there seems to be no warrant for holding an auction sale in absence of any bidders and purchasing the property by Government itself through the revenue patil on a nominal bid of one rupee In my opinion the patil cannot in such circumstances be regarded as a bidder at all It was a fictitious bid by which Government purchased the property for the nominal amount of one rupee

[30] There is nothing to show that the public were aware of the Government Resolution under which a nominal bid could be made by a Government servant in absence of bidders If the plaintiff or the public had been aware of such a Resolution the plaintiff would have probably taken care to see that there were bidders present so that the property may be sold at a fair price But it is not legal in my view, that when bidders are absent and the auction sale cannot therefore be held at all Government should step in through its servants and purchase the property in such a way as would virtually amount to confiscation

[31] I quite appreciate the difficulty of Government in a case where there is a conspiracy among the people of the locality not to make any bid at all But in order to overcome that difficulty it would not I think be impossible for Government to lay down proper rules for conducting auction sales so that the public may be fixed with the knowledge as to what would happen if no bidders were forthcoming It ordinarily happens that when no bidders are present the sale is postponed to another date If the Government apprehends that no bidders are going to come at all it should be made known to the public by proper means as to what would happen if no bidders were intentionally forthcoming on the first date of the auction In my view therefore the purchase of the property by the revenue patil for a nominal price has no warrant in law and must be set aside

[32] As regards the bar of the Revenue Jurisdiction Act, I think there was no appealable order in the present case It was only an administrative act on the part of the revenue authorities of which the public were not aware Moreover, the alleged act is *ultra vires* and it would, therefore be open to a party to bring a suit without filing any appeal as laid down in 33 Bom L R 213[3] I agree therefore that the suit is not barred by the Revenue Jurisdiction Act, and that the appeal should be allowed as proposed by the learned Chief Justice

[33] *Per Curiam* — Appellant to get possession of his lands Inquiry as to mesne profits to be held Appeal allowed with costs in the Court below and in this Court

D S *Appeal allowed*

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## A I R (34) 1947 Bombay 409 *[C N 116]*

STONE C J AND LOKUR J

*Usman Haroon and others — Applicants v Emperor*

Criminal Application for Transfer Nos 697 and 735 to 739 of 1946 Decided on 7 1 1947

(a) Criminal P C (1898) S 526 — Grounds of transfer — Reasonable apprehension that accused will not be fairly treated at trial

Section 526 is not exhaustive and apart from the susceptibilities of the accused if circumstances do exist

the offence the circumstances in which it was committed the degree of deliberation shown by the offender the provocation which he has received if the crime is one of violence the antecedents of the prisoner up to the time of sentence his age and character And these are all matters which must be established by evidence and not by impressions created on the spur of the moment [Para 15]

(Directives given as to quantifying sentences for offences arising out of communal disturbances in Bombay)

(46 Com) Cr P C S 32 N 3 Pts 3 to 6

(c) Criminal P C (1898) S 526—Criminal Courts to be above criticism

It is of vital necessity if law and order are to be maintained that the criminal Courts whose duty it is to administer the penal laws should be above criticism or challenge Justice must not only be done but must manifestly appear to be done [Para 19]

(46 Com) Cr P C S 526 N 5 Pt 16

*Cases referred* —

1 (1900) 2 Bom L R 755 25 Bom 179 In re Pandurang Govind Pujari

2 (94) 1894 Rat Un Cr C 695 Queen Empress v Hyderally

*A A Peerbhoy M R Parpia and S G K Husaini* — for Applicants

*S G Patwardhan Government Pleader* — for the Crown

**Stone C J** —We have before us six transfer applications each being by a Muslim and made on the ground that the Magistrate Mr J M Barot, Presidency Magistrate Second Court Esplanade Bombay, in whose Court the cases stand has shown, in dealing with previous cases, a communal bias and discrimination against Muslims and in favour of Hindus. Each of these applications, therefore, asks that the case of the accused may be

of some other Magistrate, who is neither a Hindu nor a Muslim. In each of these cases the accused is charged with an offence arising out of or connected with the communal disturbances.

(2) In Transfer Application No. [illegible], the accused is charged under Ss. 451, 454, 457 and 380, Penal Code, with house-breaking and theft. In Transfer Application No. [illegible] the accused is charged under Ss. 143, 147, 148, 456 and 380, Penal Code, with unlawful assembly, rioting, trespass at night and theft. In Transfer Application No. [illegible] the accused is charged under S. 326, Penal Code, with grievous hurt inflicted by a cutting instrument. In Transfer Application No. [illegible] the accused is charged under Ss. 324 and 326, Penal Code, with simple hurt and grievous hurt with a cutting instrument. In Transfer Application No. [illegible], the accused is charged under Ss. 143, 147, 148, 454, 457 and 380, Penal Code, with unlawful assembly, rioting, trespass at night, house-breaking and theft and in Transfer Application No. [illegible] the accused is charged under S. 326, Penal Code, with throwing a corrosive acid so as to cause grievous hurt.

(3) To each of these applications, is annexed in the form of schedules, lists of cases in which members of each community have been convicted or bail applications granted or refused by the Magistrate, and it is alleged, that by comparing the cases of the different communities a discrimination in treatment is established. The total number of examples given is [illegible], [illegible] referring to Muslims and [illegible] to Hindus.

(4) Such a charge levelled against the impartiality of a Magistrate is a very serious one to bring, and demands from us a most careful and exhaustive examination, because, if it be well founded, we should not hesitate to act in the most drastic manner, but, if on the other hand, the charge is unfounded, then the Magistrate is entitled to the fullest protection from this Court, and to be exonerated by us from such grave imputations against his honour as a judicial officer.

(5) As this case was opened on the first day, Mr. Purshotam, on behalf of some of the accused, made two main submissions, first, that the facts and sentences in the examples given show that bias and discrimination has taken place, and secondly, that even if that charge cannot be sustained, then at any rate the circumstances and the variations in the sentences are sufficient to induce in the mind of any reasonable person a reasonable apprehension that justice has not been done, and therefore will not be done in his particular case, so that he will not get a fair trial.

(6) By S. 526, Criminal P. C., it is provided:

"(1) Whenever it is made to appear to the High Court: (a) that a fair and impartial inquiry or trial cannot be had in any criminal Court subordinate thereto,"

the High Court may order, amongst various alternatives, the transfer of the case.

(7) But this section is not exhaustive, and as has been pointed out by Sir Lawrence Jenkins in 8 Bom. L. R. 754 [1] referring to an earlier case in the Calcutta High Court, that in considering the expediency of directing a transfer for the ends of justice, the Court has deemed it essential to decide not merely the question whether there has been any real bias in the mind of a Magistrate, but also the further question

"whether incidents may not have happened, which though they may be susceptible of explanation are nevertheless such as are calculated to create in the mind of the accused, a reasonable apprehension that he may not have a fair and impartial trial."

On the other hand, as has been laid down in 1934 Cri. C. 685 [2]

"the High Court will not pass an order of transfer merely out of deference to the susceptibilities of an accused when no sufficient grounds exist."

(8) There are many other cases in the various Courts of this country, and from them the principle is quite clear, that apart from the susceptibilities of the accused, if circumstances do exist or events have happened, which are calculated to create in the mind of the accused the reasonable apprehension that he will not be fairly treated at his trial, the transfer should be made.

(9) We have called for the records of the cases, mentioned in the schedules given to the accused's applications, and they have been fully examined by us and by counsel in this Court. What they unmistakably show is that fines and lighter sentences have been given where the accused pleads guilty, and that in the cases selected, only Hindus pleaded guilty. Further they show, and show in our opinion very clearly, that no sufficient time has been taken in order to give proper care and attention to the trial of cases, that there is no checking of the statements made by the accused, except where such statements are confirmed by the police-officer making the arrest, and that in no case has any witness for the defence has been examined. From the report, which we called for from the Magistrate, and the information supplied to this Court by the Government Pleader, it appears that from the beginning of September of this year up to and including 14th December, which is the date of the Magistrate's report, besides the ordinary day to day applications and miscellaneous work, the Magistrate has disposed of [illegible] cases arising out of the disturbances, [illegible], being cases connected with breaches of curfew orders, and the remaining [illegible] cases being of a

much more serious character With the assistance of counsel on both sides and on the information supplied we have made certain calculations, which show, that the 2990 cases were disposed of in 290 hours, if 3 minutes be attributed on a average to each curfew case, they would have occupied 88 hours of the Magistrate's time, leaving 202 hours for the trial of 1230 of the more serious cases This works out a little under 10 minutes per case That is totally inadequate The fact that the Magistrate is so busy, is poor consolation to accused persons, who will not get a proper trial, because too many cases are placed on the Magistrate s board

[10] But quite apart from this, the Magistrate has attached to his report which we required him to make, lists of comparative cases, with the object of showing that in many cases *Muslims had received lesser sentences than* Hindus, for offences against the order of the Commissioner of Police prohibiting the carrying of weapons, and whilst these lists certainly do tend to show that such is the case, they also demonstrate something else of a most disturbing character, viz, the almost infinite variety of sentences passed for the same offence We will only deal with the cases in which the carrying of a knife or some cutting instrument is alleged Of these 93 examples are given, and, in 39 of them, the substantive sentence is imprisonment, in 48, the sentence is a fine only, while in the remaining eight cases the sentence is imprisonment and a fine and in default a further term of imprisonment

[11] The terms of imprisonment comprise, one day, two weeks, three weeks, one month, two months, four months, six months and eight months, whilst the fines cover a most remarkable range: Rupees 3, Rs 5, Rs 10, Rs 15, Rs 20, Rs. 25, Rs 30, Rs 35, Rs 40, Rs 50, Rs 60, Rs 80 and Rs 100 The mixed sentences of imprisonment and fine range from. One day's simple imprisonment and Rs 30 fine or in default one week. One day's simple imprisonment and Rs 15 fine or in default one month. One day's simple imprisonment and Rs 80 fine or in default one month One day's simple imprisonment and Rs 100 fine or in default one week One day's simple imprisonment and Rs 200 fine or in default six weeks One day's simple imprisonment and Rs 400 fine or in default one month. One day's simple imprisonment and Rs 400 fine or in default two months

[12] How can such a diversity of sentences for the same offence be justified on any rational system? What difference can there be between, a man who carries a knife and is sentenced to one day's simple imprisonment and Rs 30 fine or in default one week, and a man who, for a similar offence, is sentenced to one day's simple imprisonment and a fine of Rs 15 or in default one month or again one day's simple imprisonment and Rs 400 fine or in default one month and one day's simple imprisonment and Rs 400 or in default two months?

[13] The answer is to be found in the Magistrate's report

'In deciding these riot cases I had to take into consideration not only the serious situation in the City, but also the nature of the weapon found with the accused, his position in life his profession, the place where he was found and the purpose for which it was carried In addition to these circumstances the impression created by the accused and the prosecution witnesses on the spur of the moment play a very great part in arriving at the correct decisions'

[14] The first part of the reasons given is unobjectionable, but the latter part is very wrong indeed What sort of impressions, created by the accused or the prosecution witness "on the spur of the moment", does the Magistrate take into account? This goes far beyond any consideration of whether the accused has made a truthful statement or a false one It involves the Magistrate's personal reactions in favour or against the accused, arrived at, not on evidence or on any adequate reflection, but "on the spur of the moment" We condemn this practice in the strongest terms, coupled with the infinite variety of sentences, which we can only describe as utterly capricious, it is bound to give rise to the gravest misgivings in the public mind, that justice is not being done In fact, as appears from the Magistrate's report, Hindus are also complaining of his bias in favour of Muslims We are not in the least surprised to hear this, because, as the Magistrate apparently works to no system, there are no settled principles upon which he can proceed and by which the public knows that he proceeds

[15] We now propose to lay down for the guidance of all Magistrates the following directive which all of them will follow in future with regard to the elements which are to be taken into account for the purpose of assessing the quantum of sentence We cannot do better than refer to the passage set out in Halsbury's Laws of England, Vol IX, p 256, as applied to non-jury cases It is as follows

'The Court in fixing the punishment for any [illegible]

shed by evidence and not by "impressions created on the spur of the moment"

[16] As to the scale or range of sentences to

which those elements are to be applied, we propose to give this guidance. In the weapon cases referred to in the lists of the applicants and of the Magistrate, it is really a very simple matter because the Legislature by the City of Bombay Police (Amendment) Act 15 [XV] of 1946, S. 4, has not only prescribed the maximum sentence but also the minimum sentence. The maximum sentence is one year and a fine, the minimum sentence is four months with or without a fine, and it is provided that if the Magistrate thinks fit to give a lesser sentence than four months, his reasons are to be recorded in writing. We note in passing, that although some of the cases mentioned in the lists are before this amending section came into operation, in none of the cases, the records of which we have examined, are the reasons for giving a lesser sentence than four months adequately set out. In view of the amending section, there is very little room for any great divergence in sentences. In the worst type of cases, where the knife is intrinsically a dangerous weapon of offence, and is carried by some one in a locality where disturbances are taking place, and where he cannot give any satisfactory account of his presence, the maximum sentence of one year's imprisonment should be passed; for a second of such offences one year plus a substantial fine or in default three months further rigorous imprisonment. Between that and the minimum sentence of four months prescribed by law we cannot see why there should be more than two steps that is to say six months and nine months. The minimum sentence of four months should be passed in all other cases, except where there are some special or extenuating circumstances. We have already laid it down in revisional applications before us that in the case of millhands who need a small or special knife for the purposes of their work, and who, without any malicious design, take it out into the public street on their way to their homes, rather than risk leaving it at the mill, that the proper sentence is, one week. The only other sentence of which we can conceive is for a case such as is well exemplified in one of the cases under challenge, where a peon who had an ordinary penknife used for sharpening pencils was told by his employers to take a telegram to the Post Office, and inadvertently forgot to remove the penknife from his pocket. Such cases as these should be dealt with either by binding over or by a small fine. The stick cases admit of slightly more variation in the lower sentences, because there are so many different kinds of sticks used for domestic or occupational purposes, and which are not intrinsically weapons of offence.

[17] It is quite clear that this particular Magistrate has had placed on his shoulders more work than could possibly be performed in a judicial manner, and in this respect he is entitled to sympathy, for it is impossible to try cases of this gravity involving sentences of imprisonment up to one year, at an average rate of under 10 minutes per case, that is nothing short of travesty of justice, and of itself is bound to give rise to the utmost uneasiness in the public mind, but coupled with the lack of any system by which punishment is quantified, it is inevitable that in times of communal discord, charges of discrimination and bias should be levelled against Magistrates, who are assessing the sentences in these cases by no recognised system.

[18] When these cases were called on, on the second day, Mr. Parpia, who was in possession of the Court, and to whom we are much obliged for his skilful and circumspect handling of an extremely difficult case, stated that Mr. Taraporevala, Mr. Somjee, Mr. Peerbhoy and himself had had an opportunity of carefully considering the records, which we had sent for, and which were produced in Court on the previous day, and that having considered them, he was authorised to state on behalf of these counsel and stated for himself also, that there was no justification for the charge of actual bias or discrimination by the Magistrate, and that such charge was unreservedly withdrawn. That was a very proper attitude for counsel to adopt and is in accordance with the best traditions of the bar. But quite independently of this withdrawal we have come to the same conclusion and we state, and state with emphasis, that as a result of our scrutiny of the cases relied upon by the various accused as showing bias, and of all the other factors and circumstances laid before us, that this Magistrate Mr. J. M. Barot is entitled to be exonerated and we do exonerate him from the allegations of communal bias and discrimination. But these applications have served a most useful public purpose, for they have shown up certain glaring defects in the existing system.

[19] It is a vital necessity, if law and order are to be maintained, that the criminal Courts, whose duty it is to administer the penal laws, should be above criticism or challenge. Justice must not only be done, but must manifestly appear to be done. That we regret to say has not taken place in these cases arising from the recent disturbances, not we emphasise by reason of any communal discrimination, but for the reasons we have already stated.

[20] The question remains, what is to be done with these transfer applications. The charge of bias and discrimination fails. But the applicants have shown from the materials they have

brought before this Court that they have reasonable apprehension that in the existing circumstances they may not get a full and proper trial

[21] What is needed is time for the authorities and the Chief Presidency Magistrate to make proper arrangements in order to provide, (1) that there shall be sufficient Magistrates or some other distribution of work so that these cases can be tried with that care and attention which they demand, and not by being rushed through at the rate of under 10 minutes per case, on "impressions created on the spur of the moment," and (2) that the Chief Presidency Magistrate in the light of the directive and the

[illegible]

sentences for all cases which arise out of communal strife, and should with them lay down the principles which hereafter can be followed by all Magistrates

[22] We, therefore, adjourn all these transfer applications to 11 A M on Tuesday 7th January 1947, by which date the Chief Presidency Magistrate will furnish us with a report of what has been done If in the meantime new arrangements are made, and the report of the Chief Presidency Magistrate is ready, then a special vacation bench will be formed on application being made to Lokur J

(The Chief Presidency Magistrate, on receipt of the above judgment, made an order distributing all cases arising out of the disturbances among the three Courts at the Esplanade, and circulated copies of the judgment to Magistrates concerned The trying Magistrate as well as the Chief Presidency Magistrate submitted separate reports to the High Court)

[23] **Stone C J** — The report of the Chief Presidency Magistrate which we called for by our judgment of 20th December 1946, has now been received and by it and by a circular which has been issued by the Chief Presidency Magistrate to all his Magistrates it appears that new arrangements have been made for the distribution of magisterial work arising out of the disturbances and that there will now be three Magistrates at the Esplanade Police Court whose duty it will be to try these cases The cases will go into the list of these three Magistrates on a rotation basis depending entirely upon the day upon which any particular case first happens to come before the Court In our opinion that is a very satisfactory arrangement We also note that the Chief Presidency Magistrate has sent a copy of our judgment containing our criticism with regard to the variety of sentences for the same offence to all his Magistrates and that the Magistrates have now the question of evolving a system for these sentences well before them

[24] We are asked by Mr Peerbhoy and Mr. Parpia who represent the six accused in these transfer applications that in spite of the withdrawal of the allegation of actual bias against Mr Barot and our exoneration of him, these cases should still be transferred, on the ground that the whole of the circumstances which have come to light in the investigation of this matter must have introduced into the minds of the accused a feeling that they could never get a fair trial before this Magistrate In our opinion that submission is not well founded These applications, as we have already stated, have served a very useful purpose, but it is now quite clear that in view of our previous judgment these six accused persons will get, before whichever Magistrate their cases may come a full and proper trial We do not know what will happen to these six cases in the new distribution of magisterial business which the Chief Presidency Magistrate's report informs us has been made It may well be that in levelling out the work they may go to the board of some other Magistrate, or it may be that the learned Magistrate, Mr Barot, may himself ask to be relieved of them But in the circumstances and in view of the directive and guidance given by our judgment there no longer exists any reason why we should interfere judicially We leave the matter to the Chief Presidency Magistrate The rule in each case is discharged

V R *Rule discharged*

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## A. I. R. (34) 1947 Bombay 413 *[C N 117]*

BHAGWATI J

*Manibhai Hathibhai Patel and others — Petitioners v C W. E Arbuthnot — Respondent*

O C J Misc No 66 of 1946 Decided on 12th December 1946

(a) Specific Relief Act (1877) S 54—Certiorari—Writ of—Petition for—Material facts to be stated—Omission by inadvertence—Amendment

[illegible]

maintained Where however the [illegible] the non statement of material facts in the [illegible] was due to no intention on the part of the [illegible] or deceive the Court but it was a [illegible] or want of appreciation of the [illegible] on the part of their legal advisers [illegible] inclined to inflict on the [illegible] quences which are laid [illegible] Appeal Court in (191[illegible] the petition to be amended [illegible]

(b) Specific Relief Act (1877), S. 54—Certiorari—Writ of — Rent Controller acting under Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944 — Application for writ, against —Facts to be stated.

In an application for a writ of certiorari against the Rent Controller acting under Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944, it is for the petitioners to state in their petition what was the position of the premises on 1st September 1940, whether they were let out on 1st September 1940, whether, if not so, they were let out before 1st September 1940, or were first let out after 1st September 1940, and what was the standard rent of the premises within the meaning of the definition thereof in S. 4 (4) of the Act. It is not sufficient merely to state that the rent payable by the applicants was below Rs. 80 per month. The averment keeps open the question as to what were the premises of which the standard rent had got to be taken into consideration by the Rent Controller and what was the standard rent of the premises. In the absence of the necessary averments in this behalf, the petition is certainly defective. [Para 9]

(c) Specific Relief Act (1877), S. 54—Certiorari—Writ of—Another remedy by way of appeal maintainable—Application for writ, if lies — Part II of Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944, held, did not apply and hence no appeal held was available.

*Obiter.* — Writ of prohibition can be issued to quash proceedings where it is shown that the Court below had acted without jurisdiction or in excess of jurisdiction irrespective of the fact whether there is a remedy by way of appeal available to the petitioner. On principle there is no difference between a writ of certiorari and a writ of prohibition: (1927) 1 K. B. 491; 34 A. I. R. 1947 Bom. 46 and 33 A. I. R. 1946 Mad. 504, *Ref.* [Paras 11 and 12]

*Held* however, that the right of appeal which is granted under S. 14, Bombay Rent etc. Act, 1944, is available only in those cases where Part II of the Act applies. If by virtue of the operation of S. 3 of the Act Part II of the Act does not come into operation at all, there will be no question of the right of appeal being available to the petitioners. Part II of the Act not applying at all, the provision for appeal made in S. 14 of the Act would not be of any avail to the petitioners nor could it be trotted out against the petitioners as disentitling them to a writ of certiorari or prohibitions as the case may be. [Para 12]

(d) Specific Relief Act (1877), S. 54—Certiorari—Writ of—Against whom can be issued — Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944, S. 14 (3).

High Court has power to issue writ of certiorari against tribunals or competent authorities having power by their determination within jurisdiction to impose liability or affect the rights of others.

Rent Controller acting under Bombay Rent, etc. (Control) Act, 1944 is such a person and a writ can be issued against him: 33 A. I. R. 1946 Bom. 280, *Rel. on*; (1852) 8 Exch. 203 and (1837) 3 M. & W. 21, *Ref.* [Para 13]

(e) Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act (7 [VII] of 1944)—Rent Controller has jurisdiction to decide what cases fall under Act.

A tribunal owing its existence to a statute and not to any act of parties, has jurisdiction to decide what cases fall within its jurisdiction. The jurisdiction of the Rent Controller is not a jurisdiction which rests merely upon any agreement between the parties. It is a statutory jurisdiction which is vested in the Rent Controller by the terms of the Act itself, and it has, therefore, jurisdiction to determine what are the cases which fall within its jurisdiction. If there is any dispute which arises between the parties as to whether the particular application falls within the jurisdiction of the tribunal or not, it is the tribunal which is competent to decide that dispute and determine whether the particular matter falls within its jurisdiction. If the tribunal decides it wrongly, there is an appeal provided against its decision. It has jurisdiction to determine the question as to whether the premises were at one time let out as a whole and then let out in parts. [Para 16]

*Cases referred* :—

1. (1917) 1 K. B. 486 : 86 L. J. K. B. 257 : 116 L. T. 136, Rex v. Kensington Income-tax Commissioners.
2. ('46) 33 A. I. R. 1946 Mad. 504 : I L.R. (1947) Mad. 113 : 227 I. C. 14, Ranganathan v. Krishnayya.
3. ('46) 48 Bom. L. R. 565 : 34 A. I. R. 1947 Bom. 46: 229 I. C. 212, Khurshed Mody v. Rent Controller, Bombay.
4. (1927) 1 K. B. 491 : 96 L. J. K. B. 77 : 136 L. T. 387, Rex v. North; Ex parte Oakey.
5. (1852) 8 Exch. 203 : 22 L. J. Ex. 74, Longbottom v. Longbottom.
6. (1837) 3 M. & W. 21 : 7 L. J. Ex. 13, Bruce v. Wait.
7. ('45) 47 Bom. L. R. 1070 : 33 A. I. R. 1946 Bom. 280, Juggilal Kamlapat v. Collector of Bombay.

*H. D. Banaji* — for Petitioners.

*C. K. Daphtary, Advocate-General* — for Respondent.

**Order.** — The petitioners are the owners of an immovable property known as "Bhadran Bhuvan" situate at Tardeo Junction, which they purchased on 10th May 1940. The immovable property consists *inter alia* of several shops, shops Nos. 10 to 14 whereof are the subject-matter of these proceedings. It is not stated in the petition what was the position of these shops after 10th May 1940, up to the time that the same came to be occupied by the respective parties, the only averments in the petition in this behalf which were considered relevant by the draftsman of the petition being that shop No. 10 was let out to one Sakhavat Hussein on or about 1st June 1943, at a rental of Rs. 80 per month, that the front portion of shop No. 11 was given to one Tukaram Tavde for occupation by leave and license of the petitioners on or about 1st June 1943. Tukaram Tavde paying a compensation for such use and occupation at the rate of Rs. 35 per month, that shop No. 12 was let out to one Ramchandra & Co. on or about 1st November 1944, at a rental of Rs. 80 per month, that shop No. 13 was let out to Messrs. Friendly Stores on or about 1st May 1943, on a rental of Rs. 80 per month, and that shop No. 14 was let out to one Khodadad R. Irani on or about 1st September 1943, at a rental of Rs. 115 per month. The petition does not state who were the tenants, if at all, between 10th May 1940, and the various dates above mentioned when the occupation of these various parties commenced. After setting out the parties in occupation of the several shops and when they

came to occupy the same as aforesaid, the petition proceeds to state that in about December 1943 a joint application was made by Messrs Khodadad R Irani, Messrs Friendly Stores, Tukaram Tavde and one P D Yajnik, who was the then occupant of shop No 12, to the respondent for fixing the standard rent of the premises respectively occupied by them but that the application was dismissed by the respondent on or about 3 1 1944, on the ground that he had no jurisdiction to decide the same Nothing further appears to have transpired until 21 11 1945, when the present occupants of the shops Nos 10 to 14 abovementioned made a joint application to the respondent, the terms whereof are relevant to note They stated that they were [illegible] 14 [illegible] and [illegible] ops [illegible] on

veniently as shops Nos 10, 11, 12, 13 and 14 formed a single tenement in September 1940, and prior to that the rent charged for that single tenement which was let out to one Sorab B Tata was Rs 120 per month which was the standard rent of the tenement, that the petitioners had, with a view to circumvent the provisions of the law, got that tenement divided by temporary (kutcha) wooden partitions into five tenements and had let out the [illegible]

dard rent of the galas in their occupation came to Rs 30, Rs 10, Rs 20, Rs 20 and Rs 30, respectively making in all Rs 110 They, therefore, requested the respondent to institute necessary inquiries in the matter and fix up the standard rent of the tenements according to law

[2] On receipt of the application dated 21st November 1945, the respondent wrote to petitioner 1 on 6th December 1945, requesting him to see him on any working day with all relevant documents, as he would inquire into the charges being made as rents for the shops in the said building Petitioner 1 did not appear before the respondent by 31st December 1945 and the respondent wrote to him *inter alia* on the said date intimating to him that as he had not complied with his request to see him in the matter of the charges being made as rents for the shops in the said building he, the respondent, proposed to fix the standard rents as noted therein and would do so unless definite information regarding the rent at which the premises were let in September 1940, was produced by him before 15th January 1946

[3] The petitioners thereafter appeared before the respondent on or about 3rd April 1946, when the application came up for hearing Certain preliminary objections were then raised by the petitioners objecting to the jurisdiction of the respondent to determine the standard rent of the shop and also contending that the matters comprised in the application had been finally disposed of by the respondent on 3rd January 1944. The preliminary objections were overruled by the respondent and the respondent continued proceedings to determine the standard rent of the shops The hearing of the application was postponed from time to time and was finally fixed on 28th June 1946 In the meantime, the petitioners filed this petition on 27th June 1946, and obtained a rule from my brother Chagla calling upon the respondent to show cause why a writ of *certiorari* or a writ of prohibition should not be issued against him or an order and injunction under S 45, Specific Relief Act, 1877, should not be issued against him

[4] In the petition filed by the petitioners, after setting out the facts hereinbefore set out by me as regards the purchase of the property by them and letting out of the shops to the various parties as also the proceedings before the respondent in about December 1943 and what had happened on the hearing of the fresh application dated 21st November 1945, before the respondent, the petitioners submitted that the respondent had no jurisdiction to entertain the application inasmuch as admittedly the rent payable by the applicants did not exceed Rs 80 per month The petitioners contended that the provisions of the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944, hereinafter referred to as the Act under which alone the respondent had been given jurisdiction [illegible]

Stores They further submitted that as regards the applications made by Messrs Khodadad R Irani and Messrs Friendly Stores the respondent had no jurisdiction to entertain the same as they had in December 1943 made a similar application to the respondent for determination of the amount of the standard rent which the respondent had dismissed, that they had not proceeded in appeal against the decision of the respondent dismissing the application and that the matter had therefore become final under the provisions of the Act, and there was no provision in law entitling the respondent to entertain a fresh application in respect of the same subject matter They therefore submitted that having regard to the law for the time being in force the respondent was barred from entertaining any application from the said persons and exercise jurisdiction over it. They [illegible]

submitted that in so far as Tukaram Tavde was concerned there was an additional ground that he was not a tenant at all but was merely a licensee in occupation of the premises by leave and license of the petitioners and without any rent, that to such a person the provisions of the Act did not apply and the respondent had no jurisdiction to entertain any application for determination of any rent at the instance of Tukaram Tavde. Based on these averments and submissions, the petitioners asked for various reliefs: (1) by way of a writ of *certiorari*, (2) by way of a writ of prohibition, and (3) by way of an order under S. 45, Specific Relief Act against the respondent.

[5] The respondent filed his affidavit dated 25th July 1946, wherein after raising certain preliminary objections he proceeded to state that during the proceedings before him he gathered that the whole premises, parts of which were now occupied by the applicants, were originally let to one S. B. Tata by the previous owners of the property, that S. B. Tata continued to be the tenant of the premises even after the petitioners purchased the property, such tenancy continuing up to February 1942, and that the rent paid by S. B. Tata to the petitioners was Rs. 120 per month in respect of the premises. He proceeded to state that in the course of the hearing, he understood that after S. B. Tata had vacated the premises the premises were divided into five compartments and one of these compartments was again divided into two parts, one part being occupied by Tukaram Tavde and the other part by the watchman of the petitioners, and that he intimated to the petitioners that he would fix the rents of the premises in question at the next hearing, viz., 28th June 1946, and adjourned the hearing in order to give to the petitioners an opportunity of producing any evidence in their possession as to the standard rent of the premises. As regards the previous application, which had been made before him in December 1943, he stated that he had no sufficient materials to show that the rent of the premises occupied by the then applicants exceeded Rs. 80 per month or that they were parts of larger premises occupied and let as a whole and subsequently sub-divided and that he therefore did not think that he was in a position to proceed with the applications and had therefore dismissed the same.

[6] Petitioner 1 filed an affidavit in rejoinder on 31st July 1946, wherein, after reiterating his contentions and submissions contained in the petition, he stated that only one shop which is at present occupied by Khodadad R. Irani was let out to S. B. Tata, that S. B. Tata was the tenant of the previous landlords in respect only of the said shop, but being an old servant of theirs was allowed to use the godown adjoining the said shop by leave and license and as a matter of favour. He stated that after S. B. Tata had vacated the premises the same were divided into five compartments, that the shop let out to S. B. Tata had always been in the same condition as before but that the godown adjoining the said shop was divided by the petitioners in four compartments. He submitted that the respondent had no jurisdiction to determine the question as to whether the premises were let out as a whole and then let out in parts as now sought to be contended by the applicants occupying the various parts of the premises.

[7] When the petition came on for hearing before me the Advocate-General for the respondent urged several preliminary objections. I shall first deal with two preliminary objections which, if valid, would go to show that the petition as framed is not maintainable. The Advocate-General contended (1) that the petition disclosed no cause of action, and (2) that there was such suppression or non-statement of material facts as would vitiate the whole petition. In order to appreciate these contentions of the Advocate-General, it is necessary to refer to certain provisions of the Act. Part II of the Act refers to "Residential and other premises" and by S. 3 of the Act it is laid down that the provisions of that part should apply to premises the standard rent of which exceeds Rs. 80 per mensem in areas to which the Bombay Rent Restriction Act, 1939, was applicable. Section 4 (4) of the Act defines what is "standard rent," and the standard rent in relation to any premises, there is laid down as:

"(a) the rent at which the premises were let on the first day of September 1940, or (b) where they were not let on the first day of September 1940, the rent at which they were last let before that date, or (c) where they are first let after the first day of September 1940, the rent at which they are first let, or (d) in any of the cases specified in S. 13 the rent fixed by the Controller."

Section 13 lays down in what cases the Controller may fix the standard rent. Under the terms of that section, the Controller is empowered to fix the standard rent at such amount having regard to the provisions of Part II of the Act and the circumstances of the case he deems just:

"(a) where, any premises are first let after the first day of September 1940 and the rent at which they are first let is in the opinion of the Controller excessive; (b) where, by reason of any premises having been let at [illegible] time as a whole and at another time in parts, or [illegible] reason of a tenant having sub-let a part of any premises let to him, or for any other reason, any difficulty arises in giving effect to this part; or (c) where, in the case of any premises let furnished, it is necessary to distinguish,

*for the purpose of giving effect to this Part the amount payable as rent from the amount payable as hire of furniture"*

These are the relevant provisions of the Act necessary to be referred to in connection with these contentions of the Advocate General The respondent would have jurisdiction to determine the standard rent of the premises only if the premises were first let after 1 9 1940, and the rent at which they were first let was in his opinion excessive, or where the premises were let at one time as a whole and at another time in parts, or the tenant had sub let any part of the premises let to him, or any difficulty arose in giving effect to Part II of the Act for any other reason, or where the premises had been let furnished and it was necessary to distinguish for the purpose of giving effect to this part the amount payable as rent from the amount payable as hire for the furniture These provisions however, are controlled by S 3 of the Act which lays down that the provisions of this part would apply to premises the standard rent of which exceeded Rs 80 per mensem If the standard rent of the premises did not exceed Rs 80 per mensem, S 13 of the Act would not invest the respondent with any jurisdiction to fix the standard rent of the premises The premises which have got to be considered in this connexion are the premises as they were let on 1 9 1940, or before 1 9 1940, in those cases where they had been let in fact on or before 1 9 1940, or the premises as they were first let after 1 9 1940 It may be that in those cases where the premises were first let after 1 9 1940, the rent at which they were first let was in the opinion of the Controller excessive, he would then be entitled under S 13 (a) of the Act to fix the standard rent of those premises The premises might be let at one time as a whole and at another time in parts, or the tenant might sub let a part of the premises let to him Even, in those cases, the premises would be those which have been let as a whole or let to the tenant and the Controller would then, by reason of the circumstances mentioned in S 13 (b) of the Act viz, the premises at one time having been let out in parts or a tenant having sub let a part of the premises let to him, be entitled to determine the standard rent of the smaller premises thus let out either by the landlord to the tenant or by the tenant to the sub tenant In the case of these premises, however, it would appear that the premises the standard rent of which would have to be taken into consideration by the Controller would be the larger premises and the Controller would be entitled to determine the standard rent of the smaller premises let out by the landlord to the tenant or by the tenant to the sub tenant with reference to the same, the standard rent of the larger premises being the rent thereof as laid down in S 4 (1) (a), (b) and (c) of the Act In all these cases the respondent would have jurisdiction to determine the standard rent of the premises only if the standard rent exceed Rs 80 per month, that being the condition of the applicability of Part II of the Act as laid down in S 3 thereof Based on these sections therefore, the preliminary objections which the Advocate General urged were that it was necessary for the petitioner in his petition to state what was the position of the premises whether they were let on 1 9 1940, whether if not so, they were let before 1 9 1940 or they were let first after 1 9 1940, and what were the standard rents of the premises before he could submit that the respondent had no jurisdiction to entertain the application dated 21 11 1945 The petitioners did not state any of these necessary facts, but only stated in para 11 of their petition

This statement was not a statement that the standard rent of these premises did not exceed Rs 80 per month It was only a statement with reference to the rent payable by those parties The Advocate General therefore contended that the petition did not disclose any cause of action He further contended that in an application for the issue of a writ of certiorari or prohibition which were high prerogative writs it was incumbent on the petitioners to state all material facts, and if the petitioners were guilty of suppression or non statement of material facts, the petition could not be maintained He submitted that the facts which I have mentioned earlier as necessary to be stated in order to maintain the petition not having been stated by the petitioners

runs as under

*"If on the argument showing cause against a rule nisi the Court comes to the conclusion that the rule was granted upon an affidavit which was not candid and did not fairly state the facts but stated them in such a way as to mislead and deceive the Court there is power inherent in the Court, in order to protect itself and prevent an abuse of its process, to discharge the rule nisi and refuse to proceed further with the examination of the merits"*

The Advocate General drew my attention to a passage from the judgment of Lord Cozens-Hardy M R. (p 405):

of their decision on that point, it was really unnecessary to consider the other points urged at the Bar, but as the points were of some importance and as they were argued at some length and as they formed the basis of the learned Judge's judgment, they dealt with those points also. The determination of the Appeal Court on these points was, therefore, clearly obiter. The Appeal Court, however, after reviewing the authorities which were cited before them, expressed their view that (p. 569) :

> "The true position seems to be that if there is another suitable remedy as, for instance, a right of appeal then the Court would be very loath to issue the high prerogative writ of certiorari unless it is satisfied that the Court or the officer against whom the writ is sought has acted in a manner which is contrary to the fundamental principles of justice."

They disagreed with the view of Kania J., that merely because there was a right of appeal the Court would not issue a writ of certiorari. The Advocate-General contended that in the petition before me there was no allegation at all that the Controller was acting in any way which was contrary to the fundamental principles of justice, and, therefore, even on the basis of this judgment of the Appeal Court there was no case for the issue of a writ of certiorari against the respondent. The Advocate-General invited me to go to the length of accepting the statement of the law as laid down in A. I. R. 1946 Mad. 504[2] and the judgment of Kania J. in 48 Bom. L. R. 565[3] and not to be bound by the obiter of the Appeal Court. I am, however, not inclined at this stage to go into the question in any great detail and discuss on my own the various cases which were reviewed by the Appeal Court in 48 Bom. L. R. 565,[3] in arriving at the conclusion which they did.

[11] An obiter of the Appeal Court, even though I would attach considerable weight to the same, is not necessarily binding on me, and if the circumstances of the case warranted the same, I would have certainly reviewed the cases all on my own and have come to a definite conclusion one way or the other on this aspect of the case. In so far however as the petitioners have not made any allegations in their petition that the respondent has acted in any way contrary to the fundamental principles of justice, I refrain from considering this aspect of the case in any detail and will content myself with observing that I leave the point open for decision if any future occasion arises. I must, however, observe that even though at one time the opinion was held that although the writ is not of course it will nevertheless be granted *ex debito justitiæ* to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public (*vide* Halsbury's Laws of England, Hailsham Edn., Vol. IX, p. 878, Art. 1481), the trend of authorities recently has been to hold that the fact of there being a remedy by way of an appeal is no answer to a writ of prohibition where the want of jurisdiction complained of is based upon the breach of fundamental principles of justice. There is plenty of authority for the proposition that in such cases prohibition will lie notwithstadning that there is a right of appeal. This latter proposition is based on the case in (1927) 1 K. B. 491.[4] To the same effect are also the observations in Note (r) at p. 822 of Halsbury's Laws of England, Vol. IX, where it is stated :

> "The fact of there being a remedy by way of appeal is no answer to a writ of prohibition, where the want of jurisdiction complained of is based upon the breach of a fundamental principle of justice. But unless the error involves the doing of something which is contrary to the general law of the land, or is so vicious as to violate some fundamental principle of justice, the Court will not, it seems, grant a writ of prohibition, if the applicant has an alternative remedy by way of appeal."

On principle, there is no difference between a writ of certiorari and a writ of prohibition, and these observations hold equally good in the case of a writ of certiorari as in the case of a writ of prohibition. Mr. Banaji for the petitioners did not contest these propositions, but relied upon the passage in Halsbury's Laws of England, Hailsham Edn., Vol. IX, at p. 822:

> "The Court, in deciding whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction, or an appeal lies against such absence or excess."

He contended that these were immaterial objections to the issue of a writ and the Court had jurisdiction nonetheless to issue a writ of certiorari or prohibition if the facts of the particular case warranted the issue of such a writ.

[12] There is no doubt that apart from the trend of recent authorities, the position in law as it was conceived at one time was that the writ could be issued to quash proceedings where it was shown that the Court below had acted without jurisdiction or in excess of jurisdiction, irrespective of the fact whether there was a remedy by way of appeal available to the petitioner. As I have already stated, that point is, so far as our Court is concerned, not finally decided. Even if that were the true position in law contrary to the obiter of the Appeal Court in 48 Bom. L. R. 565,[3] the petitioners would not necessarily be out of Court. The right of appeal which is granted under S. 14 of the Act is available only in those cases where Part II of the Act applies. If by virtue of the operation

of s 3 of the Act Part II of the Act, did not come into operation at all, there will be no question of the right of appeal being available to the petitioners, Part II of the Act not applying at all, the provision for appeal made in s 14 of the Act would not be of any avail to the petitioners nor could it be trotted out against the petitioners as disentitling them to a writ of certiorari or prohibition as the case may be This to my mind is the real answer to this objection of the Advocate General No doubt, if I accept the *obiter* of the Appeal Court in 48 Bom L R 565[3], there being no allegation that the respondent has acted in a manner contrary to the fundamental principles of justice, the right of appeal which is provided in s 14 of the Act would come in their way Even here the existence of

203[5] and (1837) 3 M & W 21[6] which are cited in support of that proposition in Note (d) in Halsbury's Laws of England Hailsham Edn, Vol IX, p 854 It is to be observed, however, that this passage which is relied upon by the Advocate General is under sub s (3) in Halsbury's Laws of England Vol IX, p 851, under the caption 'To what Courts the Writ of Certiorari may issue' The writ of certiorari as I have already held in 47 Bom L R 1070[7] issues not only against the inferior Courts as they are styled (p 1089)

whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division

that there being no right of appeal there was no question of the writ of certiorari or prohibition as the case may be not being granted to them even in the absence of any averment that the respondent had acted in a manner contrary to the fundamental principles of justice This in my opinion, would be an answer to the preliminary objection of the Advocate General on either point of view, whether the position in law as laid down in the passage from Halsbury's Laws of England, Hailsham Edn Vol IX, p 822, cited above and adopted by Kania J was correct or the position as adopted in the *obiter* by the Appeal Court in 48 Bom L R 565,[3] was correct This objection of the Advocate General therefore *fails*

[13] A further preliminary objection was taken by the Advocate General that the Court should not interfere by certiorari in matters which the Court itself would have no jurisdiction to try He relied in this connection on a passage from Halsbury's Laws of England, Hailsham Edn Vol IX, p 851, § 1446

'The writ can only be issued in respect of matters which are within the jurisdiction of the High Court of Justice for proceedings will not be removed into the superior Court unless they are capable of being determined there"

He also relied upon s 14 (3) of the Act where it is laid down

He submitted that in respect of these proceedings the High Court had no jurisdiction to determine the matters in dispute between the petitioners and the applicants and therefore the Court should not interfere by issuing a writ of certiorari He also relied upon two cases, (1852) 8 Exch

If this contention of the Advocate General was correct, the Court would have no jurisdiction to issue a writ of certiorari against either the Rent Controller or the Collector of Bombay who by no means can be stated to be inferior Courts within the strict meaning of that term They are, however, tribunals or competent authorities having power by their determination within jurisdiction to impose liability or affect the rights of others They are persons having legal authority to determine questions affecting rights of subjects and having a duty to act judicially, and therefore are within the category of persons subject to the controlling jurisdiction of the King's Bench Division exercising those rights

[14] It was also held by me in that case (p 1089)

the tribunal or competent authority should

the Advocate-General The cases which were cited by him and which have been mentioned by me above were cases of inferior Courts and there the writs of certiorari which were sought to be issued were to call for the record of the proceedings before the inferior Courts and look into the same which the superior Court could not do if it had no jurisdiction to determine the particular class of cases The passage which has been cited by the ... ca. tion, if at all to those

a motion for injunction and receiver was irregular where the plaintiff amends his bill between the time of giving notice of moving and the time of bringing on the motion. The Master of the Rolls there allowed the objection which had been taken that the motion was irregular, the notice having been given on a record which no longer existed and that on the existing record no notice of motion had been given. This is the only report and there is nothing further to indicate as to what was the position which obtained in that suit or the notice of motion taken out therein. It does not appear if there was or there was no opportunity to the objecting party to reply to the bill as amended. There is also nothing to show whether the objection was sustained by reason of any particular inconvenience which would be caused to the party objecting in meeting the notice of motion on the bill which had been amended. The second case was (1864) 12 W. R. (Eng.) 934.[2] There also after a notice of motion for a receiver the plaintiff, on the defendant putting in a plea, had amended his bill. He had endeavoured to bring on his motion again after the amendment, and it was contended that there was no notice of motion before the Court. It was submitted on behalf of the pleading defendant that the plaintiff by amending his bill had put an end to the motion, and Stuart V. C. expressed his opinion that the plaintiff having amended his bill the notice was gone. I have to offer the same remarks in the case of this opinion also as I did in the matter of the earlier opinion of the Master of the Rolls in (1838) 1 Beav. 54.[1] The third case, which was relied upon by the Advocate-General, was the case in (1856) 3 K. & G. 123.[3] In this case, however, before the notice of motion for injunction, which was argued actually before the Court, the plaintiffs had previously given a similar notice of motion and had afterwards amended their bill and then had given that notice of motion which was argued. It was ordered that the plaintiffs must pay the costs occasioned by the notice of motion which they gave before amending their bill as of an abandoned motion. In this case it was clear that after the amendment of the bill a fresh notice of motion had been given by the plaintiffs. That was the notice of motion which had been dealt with. The earlier notice of motion had not been brought on or argued and it was rightly treated as an abandoned motion. If that was so, the Court felt itself bound to award to the pleading defendant the costs of such an abandoned motion. In my opinion, it is as a result of all these three cases that the proposition has been enunciated in Daniel's Chancery Practice, Vol. 2, p. 1357, in the form which I have mentioned above. If a plaintiff amends his bill or statement of claim, he would be *prima facie* deemed to abandon the notice of motion which he has based on the bill or the statement of claim which was originally filed in Court, and if he wanted to bring on before the Court a notice of motion on the amended bill or statement of claim, he should, either when he made the application for amendment or when he amended his bill or statement of claim, have done so without prejudice to the notice of motion which was pending based on the original bill or statement of claim, or abandoned the old notice of motion and taken out a fresh notice of motion based on the amended bill or statement of claim. These are, however, *prima facie* considerations, as Daniel's Chancery Practice puts it. It should be done as a matter of precaution, otherwise the plaintiff may be considered to have waived it and be ordered to pay to the defendant the costs of the notice of motion which was based on the original bill or statement of claim as unamended. There is, however, in my opinion, no justification for the absolute manner in which the proposition has been enunciated in Halsbury's Laws of England, Vol. 18, p. 105 § 155. The result, therefore, in my opinion, is that if the circumstances of a particular case warrant that conclusion, the Court is not fettered in holding that under the circumstances of the particular case the plaintiff should not be considered to have waived or abandoned the notice of motion which had been taken out earlier on the bill or statement of claim as unamended. This, as I conceive it, is the true position in law, and if the matter were *res integra*, I would certainly express it as my definite opinion on the point. The difficulty is, however, created by a judgment of a Court of co-ordinate jurisdiction here, which is reported in 41 Bom. L. R. 545.[4] In that suit a notice of motion was taken out by the plaintiffs for a receiver on 7th February 1938 and while the notice of motion was pending for hearing the plaintiffs by leave of the Court amended the plaint on 17th June 1938, by adding a further or alternative ground of attack. Defendant 1 therein tendered on 22nd June 1938, an affidavit in reply on the notice of motion, and the plaintiffs tendered an affidavit in rejoinder. Defendant 1 then raised a preliminary objection that the notice of motion had been abandoned by reason of the subsequent amendment of the plaint. The position came on for consideration before Somjee J. The authorities which were cited before me were all cited before the learned Judge. The learned Judge considered both the passages, one from Halsbury's Laws of England, Vol. 18, p. 105, § 155, and the other from Daniel's Chancery Practice, Vol. 2, p. 1357, which

I have above referred to It does not appear to have been pointed out to him in what different manners both these passages had enunciated the proposition based on the very same cases which were cited there as well as here, and the learned Judge took both these passages in Halsbury's Laws of England and Daniel s Chancery Practice, as establishing the proposition as it was advanced before him that by reason of the amendment of plaint the old notice of motion must be deemed to have been abandoned Whatever, my opinion to the contrary may be, as I have already stated above, I am not in clined in this particular case and on the facts before me to disagree with the same even though, if it were necessary to do so I would go to the length of doing it because the distinction which obtains between the enunciation of the proposition in Halsbury's Laws of England, Vol 18, page 105, § 155 and Daniel s Chancery Practice, Vol 2, page 1357, was neither brought before the notice of the learned Judge nor was considered by him as I have done above

[6] The reason why I do not see any subs tance in this preliminary objection raised by the Advocate General is that by the very order made by Chagla J, on 25th June 1946, he reserved to the plaintiffs, after the decision of the clearing house sub committee was pronounced, leave to apply for an injunction in the very notice of motion restraining the second defendant company, the Bullion Exchange, from taking the threatened disciplinary action in the event of a notice in that behalf having been given by the Bullion Exchange to the plaintiffs The learned Judge there in express terms gave to the plaintiffs liberty to bring on the very notice of motion on further and fresh materials which might come into existence later on on the decision being given by the clearing house sub-committee adverse to the plaintiffs It was open to Chagla J, at that time on the objection which had been taken by the second defendants, the Bullion Exchange, in para 2 of the affidavit of their secretary, viz 'I submit that the plaint discloses no cause of action for the reliefs. claimed," to have dealt with this objection and to have dismissed the notice of motion straight away against the Bullion Exchange having regard to the fact that there was no averment in the plaint at all which would ever justify any relief in terms of prayer (f) of the plaint The learned Judge, however, did not choose to do so It does not appear also that any such point was urged by counsel for defendants 2, the Bullion Exchange, before him at the hearing of the notice of motion on 25 6 1946 Under these circumstances, the learned Judge reserved to the plaintiffs leave to bring on the very notice of motion on fresh and further materials When the decision of the clearing house sub committee was given adverse to the plaintiffs and the Bullion Exchange gave notice to the plaintiffs on 2 9 1946, that in default of the plaintiffs making the necessary payment within the time mentioned therein a further meeting would be held on 19 9 1946, to consider what action should be taken against the plaintiffs, the cause of action did arise to the plaintiffs to bring on this notice of motion, the very notice of motion which was argued before Chagla J, on 25-6-1946, and which he had expressly reserved liberty to the plaintiffs to bring on under the fresh cir cumstances which had later arisen An affidavit was filed on 16 9 1946, by Juthalal Motilal in further support of the notice of motion so that the plaintiffs could bring on before the Court the notice of motion for prayer (*3*) thereof, viz, the relief in terms of prayer (*f*) of the plaint When this affidavit was made defendants 2 through their secretary filed an affidavit in reply In that affidavit, the various allegations which had been made by Juthalal Motilal in his affidavit of 16 9 1946, were traversed and no point was ever taken that there was any techni cal flaw or defect in the notice of motion which was thus sought to be brought on before the Court These were the further and fresh mate rials on which the notice of motion was brought on before me and it was in order to regularise the whole thing, in order to see that the very materials in this affidavit of Juthalal Motilal dated 16 9 1946, should be incorporated in the plaint that I ordered Mr Banaji to amend his plaint The amendment of the plaint was with a view to regularise the whole proceeding, to set the house in order, so to say, and was not an amendment of the bill or statement of claim which could be said to be within the meaning of the authorities which were relied upon by the Advocate General in support of his preliminary objection If necessary I would go to the length of holding that by reason of defendants 2 through their secretary having replied to the affidavit of Juthalal Motilal and also by reason of defendants 1, the parties concerned in the decision

that they having tendered the affidavit in reply to the affidavit of Juthalal Motilal of 16 9 1946, to which the plaintiffs submitted the affidavit in rejoinder, the defendants should be deemed to have waived the objection, if any, to the notice of motion which was thus brought on before me Under the circumstances I am of opinion that the preliminary objection taken by the Advocate General does not lie I the

course of the arguments of the notice of motion and asked Mr. Banaji to proceed with the argument on the merits.

[7] The argument on the merits of this notice of motion, however, is not such plain sailing for Mr. Banaji. The basis of the relief which he pressed for against the Bullion Exchange is that R. 28 of the Rules of Business of the Bullion Exchange is *ultra vires* the Bullion Exchange, that the decision given by the clearing house sub-committee is illegal and void and not binding on the plaintiffs, that if the plaintiffs did not make payment of the amounts which they were ordered to pay to the various parties under the decision of the clearing house sub-committee including defendants 1, the Bullion Exchange would take steps to have the plaintiffs declared defaulters and if the plaintiffs were declared defaulters irretrievable harm would be caused to their interests. It is, therefore, urged that the Bullion Exchange, defendants 2, should be restrained from taking any disciplinary action against the plaintiffs. There is no doubt that substantial questions have got to be investigated at the hearing of this suit, but that is not enough. Whatever may be the considerations which will be urged at the final hearing of this suit on behalf of both the parties, the fact remains that R. 28 was one of the Rules of Business of the Bullion Exchange, subject to which the transactions between the various parties had been effected, the delivery order which was issued by defendants 1 for delivery of 122 silver bars was handed over by the Bullion Exchange to the plaintiffs also under the rules and regulations of the Bullion Exchange and whatever steps were taken by the Bullion Exchange were taken in accordance with those Rules and Regulations, subject to which all the transactions had been entered into by the respective parties. If *prima facie* considerations are of any avail they are *prima facie* against the plaintiffs and in favour of the defendants. This, however, I do not consider as conclusive of this notice of motion. As I stated earlier there is at least one possibility which is an essential condition of the Bullion Exchange taking the disciplinary action against the plaintiffs. The third step in the argument of the plaintiffs in order that they may sustain this application for injunction against the Bullion Exchange is that if they did not pay the monies to the Bullion Exchange to the credit of various parties in accordance with the decisions given by the clearing house sub-committee, the Bullion Exchange would take disciplinary action against the plaintiffs, a result which would be brought about only by the action of the plaintiffs themselves. If the plaintiffs paid the monies to the Bullion Exchange to the credit of the various parties, the Bullion Exchange would certainly not take any action against the plaintiffs in the exercise of the disciplinary jurisdiction which it has undoubtedly got under the Rules and Regulations of the Bullion Exchange. As Kania J. observed in the judgment of the Appeal Court dated 28-3-1946:

> "It was argued that the plaintiffs would suffer irreparable injury if they are declared defaulters. For that the remedy lies in their own hands. The plaintiffs could have paid the amount, which according to them was unlawfully demanded of them, under protest, or they could have allowed the bars to be sold on the footing that they did not pay the proper price according to the contracts and paid the deficit under protest. If that deficit was paid, there would arise no occasion for the Exchange to declare them defaulters."

This, in my opinion, is the true position. It is not open to the plaintiffs to say that if they did not comply with the particular demand or requisition of the Bullion Exchange the Bullion Exchange would take disciplinary action against them. It would be easy for them, without causing any irreparable loss or irretrievable injury to themselves, to comply with the demand of defendants 2. The plaintiffs are admittedly multi-millionaires. It is not even suggested in the affidavits in support of the notice of motion that there would be the slightest inconvienence caused to them in the matter of payment of the money. In fact, Mr. Banaji offered to the Court that his clients would deposit the monies in Court or pay them to the Bullion Exchange under protest if the Bullion Exchange either agreed not to pay or were restrained from paying over the monies which were thus paid to them under protest to the various parties concerned. This ground of inconvenience, therefore, does not exist. The remedy lies in their own hands. They are welcome to take it. If they do so, the Bullion Exchange will certainly not take any disciplinary action against them.

[8] It was, therefore, urged at the tail end, if I may call it, of the affidavit of Jhutalal Motilal dated 16-9-1946, that there would be considerable inconvenience to them if the payments were made to the parties concerned by the Bullion Exchange. Paragraph 7 (d) of the affidavit of Juthalal Motilal states:

> "That the business in Bullion Exchange is of a speculative character particularly in the abnormal times. If any of the persons to whom several lacs of rupees are directed to be paid under the said decisions of the Sub-Committee are unable to repay to the plaintiffs the large amounts which the plaintiffs shall be compelled to pay under the said awards will be lost to them and the plaintiffs will suffer irreparable loss and damage. As against this hardship, the plaintiffs claim sums amounting to several lacs of rupees in all the above suits and the same are absolutely unsecured and unprovided for. The result will be that if an injunction is not granted as prayed for by the plaintiffs the various persons in whose favour the said awards have been made will

walk away with their moneys and leave the plaintiffs to the uncertainties and difficulties of recovering their dues from them in the future"

As regards the claims in the suit they are no doubt unsecured and unprovided for There is nothing in law by which the Court could secure or provide for these claims which have been made by the plaintiffs If any case arises for an application under O 38, Civil P C, the plaintiffs will be really welcome to do so on proper materials being placed before the Court in that behalf Except for that, certainly the claims have got to be determined and decreed before any thing can be done in favour of the plaintiffs

[9] As regards the other suggestion which has been made with regard to the payment which may be made by the plaintiffs to the Bullion Exchange to the credit of the various parties, *that the parties might take away the monies on* [illegible] Bullion [illegible] ould be [illegible] of recovering their dues from them in the future, it is based merely on the speculative character particularly in abnormal times of the business on the Bullion Exchange It cannot be denied that the business on the Bullion Exchange in the main is of a speculative character On the other hand, it has been definitely averred in the various affidavits which have been filed on behalf of the various parties in whose favour the clearing house sub committee has given the decisions that they are people of substance, several of them owning immovable properties and there is not the slightest ground for any apprehension that if the decision of the suit or suits were in favour of the plaintiffs the monies which the plaintiffs pay out to them through the Bullion Exchange would not be forthcoming at the proper time The uncertainties and difficulties of recovering their dues are always there facing the plaintiffs even though they obtain a decree against the defendants What the Court has got to see is whether there is any reasonable ground of apprehension at the time when the application is made before it The only thing which Juthalal Motilal has been able to say in his affidavit dated 19th September 1946, is in para 6 thereof

"As regards the substance and worth of the various persons referred to therein I am not aware of all the facts relating thereto"

In my opinion this allegation is as vague as vague can be It is really tantamount to saying that he is not in a position to deny any of the allegations which have been made in the affidavits of the various parties If he is not in a position to deny the same, I am entitled to act upon those allegations as correct Under the circumstances, I do not see any reason for any apprehension that any inconvenience would be caused in the matter of the recovery of these sums from the various parties to whom the Bullion Exchange might pay them, in the event of the plaintiffs being successful in the several suits which have been filed by them in this Court It may be interesting in this connection to note what Chagla J stated in the notice of motion which had been taken out by the plaintiffs in Suit No 842 of 1946 In that suit the plaintiffs had paid to the Bullion Exchange the amount which had been awarded in favour of Bisesarlal Chirawawala by the clearing house sub-committee, and the plaintiffs took out a notice of motion to restrain the Bullion Exchange from paying over the amount to Bisesarlal Chirawawala Affidavits of the same nature as we find here were made in that notice of motion also Bisesarlal Chirawawala had pointed out that they were parties of substance and the learned [illegible]

there is no apprehension whatever that if the plaintiffs were to succeed in their suit and obtain a decree against them they would not be in a position not only to refund the amount paid by the second defendants to them but to satisfy the decree, and in the affidavit in rejoinder [illegible]

say that the not granting of the injunction would prejudice him or cause complications or would be a matter of inconvenience'

This was the ratio adopted by Chagla J, and I fully endorse the same On this particular point the position here is exactly analogous to the position which obtained before Chagla J, and I do not see any reason for interfering with the ordinary course of business which would be, the compliance by the plaintiffs with the demand or requisition of the Bullion Exchange or the taking by the Bullion Exchange of such steps as they may be entitled to do under their Rules and Regulations in the event of default being committed by the plaintiffs as intimated in the letter dated 2nd September 1946

[10] Under the circumstances above, I do not think it necessary to discuss the decision in (1938) 1 ALL E R 115,[5] which was cited by the Advocate General in support of his contention that the second defendants had merely intimated that they would take such action as they may be advised against the plaintiffs in the event of default and that the plaintiffs' notice of motion

for an injunction restraining the second defendants from taking disciplinary action against them was premature. I may only say this that it is not merely an intimation that some steps would be taken. The only construction which can be put upon the letter dated 2nd September 1946 is that disciplinary action would be taken against the plaintiffs in the event of default being committed by them in the matter of the payments demanded of them in that letter and the judgment of Farwell J. in that case itself shows that (p. 119) :

> "It is quite true that, in a proper case, the Court will determine matters of this kind in a *quia timet* action, but there must be before the Court, before it will entertain a *quia timet* action, satisfactory evidence that the defendant is threatening or intending to do that which it is said he is not entitled to do, or that which, it is said, will lead to serious damage to the plaintiff."

If necessary I would say that the present case is covered by this dictum of Farwell J.

[11] Having regard to the considerations which I have mentioned above, I have come to the conclusion that the notice of motion of the plaintiffs fails and should be dismissed with costs. The costs will be the costs, as taxed, incurred after 25th June 1946. There will be two sets of costs, one of the first defendants and the other of the second defendants, the Bullion Exchange.

R.G.D. *Order accordingly.*

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## A. I. R. (34) 1947 Bombay 430 *[C. N. 119.]*

KANIA J.

*Vallabhdas Narandas — Applicant* v. *Kantilal G. Parekh — Respondent.*

O. C. J. Award No. 47 of 1928, Decided on 12-12-1945.

(a) **Civil P. C. (1908), O. 21, R. 11 (2) (j)— Issue of notice under O. 21, R. 22 if mode of execution—Civil P. C., O. 21, R. 22.**

The object of O. 21, R. 11 (2) (j) is for the decree-holder to inform the Court the manner in which the Court can get for him the relief granted by the decree. The issue of a notice under O. 21, R. 22 is not a mode of execution or enforcement of a decree and is not a relief which the party asks as awarded by the decree and an application for execution in which under the heading under O. 21, R. 11 (2) (j) "the mode in which the assistance of the Court is required" is written "By the issue of a notice under O. 21, R. 22 against the judgment-debtor" is not a proper application for execution within the meaning of O. 21, R. 11: 30 A. I. R. 1943 Bom. 238, *Dissent.*; 25 A. I. R. 1938 Bom. 405, *Approved.* [Para 5]

('44-Com.) C. P. C. O. 21, R. 11 N. 12 Pts. 1, 5.

(b) **Civil P. C. (1908), O. 21, R. 11 (2) — Scope.**

Order 21, R. 11 (2) prescribes the form for the execution of a decree in all cases. It is not limited to a money decree. [Para 5]

(c) **Civil P. C. (1908), O. 21, R. 11 (2) (j)—Decree-holder not aware of any property of judgment-debtor if can apply for attachment.**

If a decree-holder does not know of any property of the judgment-debtor which he can attach he cannot make a proper application under O. 21, R. 11 (2) (j), because he will not be able to give particulars of the property which he asks the Court to attach. [Para 6]

*('44-Com.) C. P. C., O. 21, R. 11, N. 12.*

(d) **Civil P. C. (1908), O. 21, R. 11 (2) (j)—Application for arrest of judgment-debtor — Decree-holder perfectly conscious that Court will not order arrest —Effect of.**

The decree-holder may be perfectly conscious that the Court will not make an order for the arrest of the judgment-debtor but that does not prevent him from making an application for the arrest. By doing so he complies with the provisions of O. 21, R. 11 although he may fail to obtain an order for arrest from the Court. [Para 6]

(e) **Civil P. C. (1908), O. 21, R. 17 — Amendment after limitation — Defect arising through practice and precedent of Court — Civil P. C., S. 151—Limitation Act (1908), Art. 182.**

The decree-holder in accordance with the practice and a decision of the High Court stated in his application for execution that the mode in which assistance of the Court was required was "By the issue of a notice under O. 21, R. 22 against the judgment-debtor." The High Court held that the issue of a notice under O. 21, R. 22 was not a mode of execution and that its practice and decision upon which the decree-holder had relied were wrong and the application for execution therefore was defective :

*Held* that (1) even though the period of limitation for making a fresh application for execution had expired the decree-holder should be allowed to amend the application by inserting the words "By the arrest and detention in prison of the judgment-debtor" in place of the words "By the issue of a notice under O. 21, R. 22 against the judgment-debtor" as the error was committed by the decree-holder through no fault of his: 25 A. I. R. 1938 Bom. 405, *Disting.*; [Para 7]

(2) the Court could allow the above amendment under S. 151, Civil P. C. to meet the ends of justice. [Para 7]

('44-Com.) C. P. C., O. 21, R. 17, N. 2, 3.

('44-Com.) Lim. Act, Art. 182, N. 86a Pts. 16 to 21.

(f) **Civil P. C. (1908), O. 21, Rr. 17 and 22— Notice under O. 21, R. 22 issued—Application for execution held to be defective and amendment allowed—Fresh notice if necessary.**

In response to a notice under O. 21, R. 22 the judgment-debtor appeared and objected that the execution application was defective. The objection was allowed but the decree-holder was permitted to remove the defect by amending the application :

*Held* that the amendment related back to the original date of the application which must therefore be taken to have been in proper form when it was filed. Hence notice under O. 21, R. 22 which was on the record must be taken to have been properly issued and no fresh notice under O. 21, R. 22 was necessary after the amendment. [Para 8]

(g) **Civil P. C. (1908), O. 21, R. 22— Costs—Civil P. C., S. 35.**

In the normal course, a notice under O. 21, R. 22 is made absolute without costs being awarded. The principle is that the decree-holder himself not having applied for execution of the decree for more than a year had to come to Court. That not being the fault of the debtor, the decree-holder cannot get the costs from him. Where the validity of the execution application and the issue of notice had been argued at considerable length because of the wrong precedent and practice of the

Court for which the parties could not be blamed it was ordered that the ordinary practice should be adopted and no order for costs should be made [Para 10]

*Cases referred* —

1 (43) 45 Bom L R 400 30 A I R 1943 Bom 238 209 I C 593, Odhvaji Anandji v Haridas Ranchhoddas

2 (38) 40 Bom L R 676 25 A I R 1938 Bom 405 I L R (1938) Bom 708 177 I C 989, Mahomedbhai v Dawoodbhai & Co

*R J Kolah* — for Applicant
*M V Desai* — for Respondent

**Order** — The parties have come before the Court on the hearing of a notice under O 21, R 22 The facts leading to these proceedings are these There were cotton dealings between the applicant and the respondent Disputes between them were referred to arbitration and on 23 3 1928, an award was made That was filed on 19th April 1928 An application for execution was made and a notice under O 21, R 37 was issued on 20th May 1928. When that notice came for hearing on 30th August 1928, a consent order was taken The respondent agreed to pay the amount by monthly instalments of Rs 200 It must be remembered that at the time of these proceedings the old Arbitration Act was in force Under that an award could be executed as if it were a decree without a decree being passed in terms of the award On 22nd July 1933, a second application for execution was filed which also appears to have been for the arrest of the debtor Notice under O 21, R 22 was dispensed with, and on 25th July 1933, a warrant was ordered to issue That remained unexecuted The applicant filed the present application for execution on 29th June 1945 He has filled in the necessary particulars in the different columns as required by O 21, R 11 In the last column headed "the mode in which assistance of the Court is required *it is written as follows By the* issue of a notice under O 21, R 22 Civil P C, against the respondent herein ' In col (f), where the applicant has to state the dates and nature of previous applications and the result thereof, he has set out the dates of the two previous applications and the fact that the warrant last issued was not executed This application when lodged in the office was taken on file, and on 29th June 1945 the Prothonotary, under the powers vested in him by the High Court Rules directed that notice under O 21 R 22 should issue That notice was issued on 28th July 1945, and has now come for hearing

[2] On behalf of the applicant it is contended that the notice must be made absolute He made his application for execution on 29th June 1945, which is within 12 years of the date of the last order, and therefore the application is in time On behalf of the respondent, it is contended that the application for execution made on 29th June 1945 is not a proper application within the meaning of O 21, R 11 and, therefore, the same must be rejected If so, no notice can be issued under O 21, R 22 It is contended on behalf of the respondent that the proceedings under O 21, R 22 follow an application for execution, and it is not open to a decree holder to write in the last column which provides for the mode of execution By the issue of a notice under O 21, R 22' It is argued that the issue of such a notice is not a mode in which assistance of the Court can be required On behalf of the applicant on the other hand it is contended that when the judgment debtor has no property and it is apprehended that under the amended law of arrest he will not be detained in prison the only procedure by which the decree can be kept alive is by obtaining an order under O 21, R 22 That will result in the revival of the decree, and under Art 183 Limitation Act the decree will not become time barred if an application for execution is made within 12 years after the date of revival Two questions arise on this application (1) whether an application for execution, in the last column of which is written ' By the issue of a notice under O 21, R 22, against the judgment debtor, is a proper application for execution within the meaning of O 21, R 11, and (2) whether the issue of a notice under O 21, R 22, is a mode in which the Court renders assistance to the decree holder

[3] My attention has been drawn to two judgments in this connection One is my own judgment in 45 Bom L R 400[1] In that case the specific question came to be discussed before me On behalf of the creditors, it was contended that they did not know of any property which the debtor owned and which they could attach They further stated that they had no materials on which they could press the Court to order the arrest and detention in prison of the judgment-debtor Under the circumstances they had no remedy except to apply to the Court to revive the decree in the hope that if the judgment debtor acquired property thereafter the decree could be executed against him On an enquiry made in the office of the Prothonotary it was reported to me that the statement in the last column, that a notice be issued under O 21, R 22 was one of the normal statements. On the facts of that case, and on that report I held that there was nothing irregular in that application and the same should be considered a proper application for execution under O 21 R 11 At that time my attention was not drawn to the judgment of the Appeal Court in 40 Bom L R. 676[2] In that case the applicant had obtained a decree in the Court of the First Class Subordi-

nate Judge at Ahmedabad. The decree was against three defendants of whom the then respondent was one. When a notice under O. 21, R. 22, was issued against the respondent, he contended that the decree was time-barred. The applicant relied on the fact that on 25th July 1934, he had applied for execution of the decree to the Ahmedabad Court and an order was made on that date transferring the decree to the Bombay High Court for execution. It was argued that the application for the transfer of the decree to Bombay was a step-in-aid, and afforded a fresh starting point for the period of limitation. It must be noticed that the whole discussion there was in respect of Art. 182, Limitation Act. That portion of the discussion is not material in the present case. The application for execution contained in col. (j) the following: "By attachment under O. 21, R. 54, Civil P. C. and issuing notice under O. 21, R. 22, of the said Code." The notice came for hearing in Chambers before Engineer J., and he considered the words used in the last column in two parts: (1) by attachment under O. 21, R. 54; and (2) by issuing notice under O. 21, R. 22. It was observed that the first part was not in order as it did not give particulars of the property sought to be attached. As regards the second part, viz., issuing notice under O. 21, R. 22 of the Code, the learned Judge was of the opinion that it was not one of the modes in which the assistance of the Court could be rendered within the meaning of O. 21, R. 11. The matter went in appeal. Beaumont C. J., in dealing with the application, observed as follows (p. 691):

"All that appears in col. (J) the heading of which is 'mode in which assistance of the Court is required,' are the words, 'By attachment under O. 21, R. 54, Civil P. C., and issuing notice under O. 21, R. 22 of the said Code.' Without anything more to go upon it would have been impossible for the Court to execute the decree."

[4] In the Appeal Court, the question whether the application would have been in proper form, if the last column contained only "by issuing notice under O. 21, R. 22" does not appear to be specifically discussed. It appears however to have been assumed that it would not have been so, because there would have been otherwise no necessity to permit an amendment by inserting the particulars of the property sought to be attached.

[5] The question whether the issue of a notice under O. 21, R. 22, is the proper phrase to be used in col. (j) has to be decided on the wording of O. 21, R. 11 (2) (j), which provides as follows:

"(j) the mode in which the assistance of the Court is required, whether (i) by the delivery of any property specifically decreed; (ii) by the attachment and sale, or by the sale without attachment, of any property; (iii) by the arrest and detention in prison of any person; (iv) by the appointment of a receiver; (v) otherwise, as the nature of the relief granted may require."

Sub-rule (2) prescribes the form for the execution of a decree in all cases. It is not limited to a money decree. The last col. (j) therefore is headed "the mode in which the assistance of the Court is required." The object of the application being to enforce the decree (which the Court has passed) the Court is requested to render further assistance to the holder of the decree. He informs the Court the mode in which the Court can assist him. But all this is for the purpose and with the object of getting for the decree-holder the relief which the Court has already granted under the decree. Reading the whole of that clause it is clear that the object of the statements in that column is for the decree-holder to inform the Court the manner in which the Court can get for him the relief which it has already granted. Except that, there is no other object for the application for execution and for the words put in that column. The Court may pass a decree for specific performance of a contract, or for restitution of conjugal rights, or for delivery of specific movable property, or a mandatory injunction to demolish certain obstructions. A Court may pass a decree in several forms. The first four sub-clauses of cl. (j) deal only with the return of specific property, or the arrest of the judgment-debtor, or the sale of his property, or the taking custody of his property through the mediation of a receiver. But there are several other decrees in which these kinds of relief are not suitable or applicable. Therefore cl. (v) is inserted as a general residuary clause. That must, however, as the words used therein clearly indicate, also relate to the nature of the relief which the Court has granted by the decree. To put it in other words the application for execution is only for the purpose of asking the Court to get the actual relief for the decree-holder. Asking the Court to extend the life of the decree for execution is not, in my opinion, a mode in which the Court's assistance can be asked to get the relief awarded by the decree. To obtain extension is a relief not awarded by the decree. In my opinion, therefore, the practice hitherto followed in the Prothonotary's office of permitting the statement "By the issue of a notice under O. 21, R. 22" in col. (j) of O. 21, R. 11 (2), is not supported by authority and is wrong. The words of O. 21, R. 22, assume the existence of an application for execution, which is assumed again to be in accordance with O. 21, R. 11, read if necessary with O. 21, R. 17. When such an application for execution is made, the Court has to scrutinise whether it is made within a year of the previous application. If it finds the same to be beyond that period the Court directs

a notice to issue That notice the Court may make absolute after hearing the parties Although the application for execution is on file the decree holder does not get the relief through the assistance of the Court The Court directs the issue of a notice In my opinion therefore the issue of a notice under O 21 R 22 is not a mode of execution and is not a relief which a party asks as awarded by the decree He has to wait because he has come to Court one year after the previous order of execution This is made clear again by the words of R 22 On proper grounds being shown the Court can dispense with the issue of that notice This clearly indicates that it is not a mode of execution or enforcement of the decree It is a hurdle which the decree holder has to cross or which obstruction is removed by the special order of the Court before he obtains the relief awarded to him by the decree The judgment in 45 Bom L R 400[1] to the extent it is held that an application for execution which contains in col (j) the words 'By the issue of a notice under O 21 R 22 is a proper application as prescribed by O 21, R 11, is erroneous

[6] The argument that the decree holder is unable to trace the property of the judgment-debtor or has not sufficient grounds to obtain an order for his arrest and detention in prison cannot be considered sufficient to act in contravention of the express provisions of O 21 R 11 If a decree holder does not know of any property of the judgment-debtor which he can attach he cannot make a proper application under O 21 R 11 cl (j), because he will not be able to give particulars of the property which he asks the Court to attach That difficulty, however, does not exist in the case of an application for the arrest of the debtor The decree holder may be perfectly conscious that the Court will not make an order for the arrest That [illegible]

[illegible] prison of the judgment debtor as required by O 21, R 11 By doing so he complies with the provisions of law although he may fail to obtain the order from the Court Such an application, when filed, is according to the prescribed form and will be retained on file of the Court That will meet the requirements of law

[7] That brings me to the question as to what should be done in the present case It is obvious that by the long practice prevailing in the Prothonotary s office, which was accepted in 45 Bom L R 400[1] the applicant was led to believe that the application for execution filed by him in the present case was in proper form Should he suffer for that erroneous belief on his part? He was led to that belief by the practice and the decision mentioned above which I have held are both wrong I do not think the applicant should suffer for that erroneous belief, which has been caused by the Court s practice In the alternative the applicant has applied for an amendment of his application Under the circumstances I allow the applicant to amend the application for execution by inserting in the last column the words By the arrest and detention in prison of the judgment-debtor Under O 21 R 17, the Court has power to permit an amendment even after the period of limitation has expired It is true that the Court should not make the respondent lose a valuable right if the right was acquired through the negligence or delay of the decree holder In the present case the applicant committed the error through no default of his and therefore I am unable to allow the respondent to insist on his right which he otherwise may have got It was argued that the permission to allow the applicant to amend his application for execution in the manner mentioned above would mean allowing him to set up a totally new and independent case It was pointed out that in 40 Bom L R 676[2] there was already an application for execution in which the applicant had sought to attach the property of the debtor although the description of the property was not mentioned It was contended that if the attachment of one property was asked for the Court would not allow by way of amendment attachment of another property In my opinion all these questions in the circumstances of this case, do not arise The facts of the present application are not similar to the facts of any of these illustrations I therefore think that the order for amendment under R 17 is just and proper in the present case If necessary S 151, Civil P C, enables me to grant that relief in the exercise of my discretion and allow the amendment to meet the ends of justice On that amendment being made the application under O 21 R 11 will be in order and the notice under O 21 R 22 will be [illegible]

[8] Mr Desai on behalf of the [illegible] contends that even on the [illegible] Court today a proper [illegible] only comes into being [illegible] applicant must cause another [illegible] According to him [illegible] issued and served [illegible] half of the [illegible] on the [illegible]

[illegible]

*"The plaintiffs here do not claim as specific appointees of any part of the defendant's separate estate. They are merely in the nature of general creditors seeking to obtain payment by a sort of equitable action of assumpsit or debt. In such a case, it is a strong exercise of authority to deprive the defendant, on motion, of property on which the plaintiffs have no specific claim, in order that, if they establish their claim as creditors, there may be assets wherewith to satisfy them. I do not mean to say that such a course may not be taken, though I have not discovered any authority for it. Perhaps the anomalous nature of the right, where a plaintiff is claiming as a general creditor of a married woman, and is seeking payment out of her separate estate, and the inability of the Court to govern the proceedings in equity in such a case by rules strictly conformable to those which regulate an action at law, may warrant the interim interference by a receiver. But a chance of doing a wrong to the defendant in such case is certainly much greater, and much more apparent, than where a right asserted is a right against some specific fund or estate."*

I do not think there is any serious chance of doing at any rate any irreparable wrong to defendant 3 in the present case by granting the injunction sought. It is true that it is an injunction that is sought on this motion and not a receiver, but the effect of the injunction would be to make the Assam Oil Co., receivers without remuneration and without security of the fund in question, and therefore the principles which govern the appointment of a receiver must, in my opinion, be applicable to the injunction sought. There are, however, in this particular case at least two distinctions from the position in (1853) 4 H. L. C. 997.[1] One is that the plaintiffs here are not claiming under any sort of equitable action of assumpsit or debt as against defendant 3. They are, as I have pointed out, bringing an action in tort. The other is a point which was only slightly considered in the House of Lords, viz., that the rights of other creditors, if there are any, have always got to be considered on applications of this kind. Taking those two considerations together, let me suppose that defendant 3 became insolvent tomorrow. The plaintiff would not even have a right to prove against his estate, his claim being a claim for unliquidated damages for tort. It would indeed be strange by granting an injunction or appointing a receiver on his motion I were to transpose him from the unenviable position he now occupies of not being even a creditor in insolvency into the much more fortunate one of a secured creditor, and the very strangeness of such a result seems to be a strong reason why I should not produce it. I have not been able to discover any authority for the proposition that a person who has been defrauded by the abuse of knowledge which one of the defendants ought to have treated as confidential knowledge has any right in equity to follow the proceeds of the abuse of that knowledge. The right of a person whose money or tangible property has been wrongfully taken to trace that money or follow that property into whatever form it may have been converted is well established, but the right now claimed is a right to a charge on property which never belonged to the plaintiff but which is alleged to have come into existence as a result of the dishonest conduct of defendants 1 and 2. I do not think I can at this late stage of the 20th century invent such a new right, particularly when, as I have pointed out, to do so would have the extraordinary effect of converting the plaintiff, in an action as against defendant 3 for unliquidated damages in tort, into a secured creditor. I fully appreciate the attraction and force of Mr. Banaji's argument inviting me to do so. In one sentence it amounts to this: Prevention is better than cure. With that proposition no one, I think, would disagree. Applied to the facts of the present case it is fallacious because it is sought to prevent a wrong by what might very likely, if defendant 3 is, as the plaintiff alleges, in straightened circumstances, amount to an infringement of the rights of third parties. What in fact and in effect the plaintiff is asking for is, really, attachment before judgment, and though there is evidence that the plaintiff may not get his money if the order sought is not made, even if he succeeds in the suit, there is no evidence at all that defendant 3 is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of my jurisdiction, and in the absence of such evidence I cannot grant attachment before judgment. An early date for hearing has already been fixed and consequently there is no order that I can make on the motion except that costs be reserved to the trial Judge. Interim injunction pending an application to the Appeal Court up till 2 o'clock tomorrow afternoon.

K.S. *Order accordingly.*

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**A. I. R. (34) 1947 Bombay 436** *[C. N. 121.]*

BHAGWATI J.

*Nawroji Vikaji Vakharia — Plaintiff* v. *Chunilal B. Desai and others—Defendants.*

O. C. J. Suit No. 2004 of 1946, Decided on 26-11-1946.

(a) Bombay High Court Rules (O. S.) (1936), R. 350 and Form No. 7 — 'Special leave' — Leave under R. 350.

The leave under R. 350 is a 'special leave' which has got to be mentioned in form No. 7. [Para 2]

(b) Bombay High Court Rules (O. S.) (1936), *form* No. 7—Provisions of, whether mandatory.

The requirements of form No. 7 annexed to the High Court Rules are absolutely mandatory by virtue of the provisions of R. 344 and a notice of motion not complying with these requirements is liable to be dismissed. [Paras 3 & 4]

*M. V. Desai and H. D. Banaji*—for Plaintiff
*K M Munshi* (for Nos 1, 2 and 3) and *M P. Amin and J M Shelat* (for No 4) — for Defendants

**Order.**—A preliminary point has been urged in this notice of motion by Mr. Munshi for the defendants that the notice of motion is not in form No 7 annexed to the High Court Rules and that it should, therefore, be dismissed The plaintiff took out this notice of motion on 31st October 1946, and obtained from my brother Blagden leave under High Court R 350 to serve notice of motion in terms of the draft produced, returnable on 6th November 1946 An interim injunction in terms of prayer (a) with certain modifications was granted on the same day, and liberty was given to the defendants or any of them to bring on the notice of motion earlier before 8th November 1946, on 48 hours' notice in writing to the plaintiff's attorneys It appears that the draft of the notice of motion, which was submitted to my brother Blagden that day and which after due engrossment appears to have been served on the defendants, did not make any mention of the fact that leave under R 350 had been granted by the Court to serve the notice of motion for the particular date It also did not mention the

that behalf to the plaintiff's attorneys Mr Munshi for the defendants has submitted that under R 344 of the High Court Rules, the notice of motion has got to be in Form No 7 with such variations as the circumstances may require, and the provisions of R 344 are mandatory. The plaintiff had obtained leave from the Court under R. 350 and that fact ought to have been mentioned in compliance with the form No 7. In Form No 7 it has been provided

> "If special leave has been obtained add as follows And *take notice also that special leave to give this* (if so, short) notice for the day and hour appointed has been obtained from [His Lordship Mr Justice , or as the case may be the Prothonotary and Senior Master ] '

In so far as the plaintiff had obtained leave under R 350 of the High Court Rules to serve notice of motion for the particular date, *prima facie* it was necessary for him to have mentioned this fact in the notice of motion in accordance with the requirements of Form No 7.

(2) Mr M V. Desai for the plaintiff, however, argued that this paragraph was to be added in the Form No. 7 only if special leave had been obtained, and on a reading of the Rr. 345 and 350, he submitted that the words "special leave" were appropriate only to a case where special leave to serve the notice of motion under R. 345 was obtained by the plaintiff from the Court He submitted that there was no warrant for treating the leave under R. 350 as "special leave" It was ordinary leave which did not require to be specified in Form No 7 If one reads Rr 345, 347

in Form No. 7 have reference not only to the leave under R 345 but also to leave obtained by the plaintiff under Rr 347 and 350 No doubt R 347 is deleted from the Rule book of late, but a reference thereto is necessary for the purposes of understanding the words which have been used in Form No 7 "as the case may be the Prothonotary and Senior Master" Leave under R 345 and leave under R 350 were within the province of the Court The Prothonotary and Senior Master could not grant the same When R 347 was in operation, leave under R 347 was competent to the Prothonotary and Senior Master to grant by reason of R 89 of the High Court Rules which delegated certain work to be done by the Prothonotary and Senior Master Leave under R 347 if there was nothing more, required by the plaintiff was thus competent to the Prothonotary to grant If he had granted such leave, that fact was required by Form No 7 to be mentioned therein Otherwise the words "as the case may be the Prothonotary and Senior Master" would not have been contained in Form No 7 The very fact that this provision is contained in Form No 7 goes to show that the words "special leave" mentioned in Form No 7 did not mean the special leave as submitted before me by Mr M V. Desai, viz, the special leave contemplated by R. 345 only The words "special leave" in Form No 7 were meant to include not only special leave under R 345 but also the leave which was granted by the Prothonotary and Senior Master under R 347 If this is so, I can

M. V. Desai that leave under R 350 to serve notice of motion for a particular date was absolutely unnecessary to be applied for or to be granted by the Court if R 345 did not come into operation at all He urged that in this particular case the notice of motion was made returnable on 8th November 1946, which would certainly

were correct, it would render the provision as to leave under R. 350 absolutely nugatory in those cases where it would not be absolutely necessary

"The plaintiffs here do not claim as specific appointees of any part of the defendant's separate estate. They are merely in the nature of general creditors seeking to obtain payment by a sort of equitable action of assumpsit or debt. In such a case, it is a strong exercise of authority to deprive the defendant, on motion, of property on which the plaintiffs have no specific claim, in order that, if they establish their claim as creditors, there may be assets wherewith to satisfy them. I do not mean to say that such a course may not be taken, though I have not discovered any authority for it. Perhaps the anomalous nature of the right, where a plaintiff is claiming as a general creditor of a married woman, and is seeking payment out of her separate estate, and the inability of the Court to govern the proceedings in equity in such a case by rules strictly conformable to those which regulate an action at law, may warrant the *interim* interference by a receiver. But a chance of doing a wrong to the defendant in such case is certainly much greater, and much more apparent, than where a right asserted is a right against some specific fund or estate."

I do not think there is any serious chance of doing at any rate any irreparable wrong to defendant 3 in the present case by granting the injunction sought. It is true that it is an injunction that is sought on this motion and not a receiver, but the effect of the injunction would be to make the Assam Oil Co, receivers without remuneration and without security of the fund in question, and therefore the principles which govern the appointment of a receiver must, in my opinion, be applicable to the injunction sought. There are, however, in this particular case at least two distinctions from the position in (1853) 4 H. L. C. 997.[1] One is that the plaintiffs here are not claiming under any sort of equitable action of assumpsit or debt as against defendant 3. They are, as I have pointed out, bringing an action in tort. The other is a point which was only slightly considered in the House of Lords, viz., that the rights of other creditors, if there are any, have always got to be considered on applications of this kind. Taking those two considerations together, let me suppose that defendant 3 became insolvent tomorrow. The plaintiff would not even have a right to prove against his estate, his claim being a claim for unliquidated damages for tort. It would indeed be strange by granting an injunction or appointing a receiver on his motion I were to transpose him from the unenviable position he now occupies of not being even a creditor in insolvency into the much more fortunate one of a secured creditor, and the very strangeness of such a result seems to be a strong reason why I should not produce it. I have not been able to discover any authority for the proposition that a person who has been defrauded by the abuse of knowledge which one of the defendants ought to have treated as confidential knowledge has any right in equity to follow the proceeds of the abuse of that knowledge. The right of a person whose money or tangible property has been wrongfully taken to trace that money or follow that property into whatever form it may have been converted is well established, but the right now claimed is a right to a charge on property which never belonged to the plaintiff but which is alleged to have come into existence as a result of the dishonest conduct of defendants 1 and 2. I do not think I can at this late stage of the 20th century invent such a new right, particularly when, as I have pointed out, to do so would have the extraordinary effect of converting the plaintiff, in an action as against defendant 3 for unliquidated damages in tort, into a secured creditor. I fully appreciate the attraction and force of Mr. Banaji's argument inviting me to do so. In one sentence it amounts to this: Prevention is better than cure. With that proposition no one, I think, would disagree. Applied to the facts of the present case it is fallacious because it is sought to prevent a wrong by what might very likely, if defendant 3 is, as the plaintiff alleges, in straightened circumstances, amount to an infringement of the rights of third parties. What in fact and in effect the plaintiff is asking for is, really, attachment before judgment, and though there is evidence that the plaintiff may not get his money if the order sought is not made, even if he succeeds in the suit, there is no evidence at all that defendant 3 is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of my jurisdiction, and in the absence of such evidence I cannot grant attachment before judgment. An early date for hearing has already been fixed and consequently there is no order that I can make on the motion except that costs be reserved to the trial Judge. Interim injunction pending an application to the Appeal Court up till 2 o'clock tomorrow afternoon.

K.S. *Order accordingly.*

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## A. I. R. (34) 1947 Bombay 436 *[C. N. 121.]*

BHAGWATI J.

*Nawroji Vikaji Vakharia — Plaintiff* v. *Chunilal B. Desai and others—Defendants.*

O. C. J. Suit No. 2004 of 1946, Decided on 26-11-1946.

(a) Bombay High Court Rules (O. S.) (1936), R. 350 and Form No. 7 — 'Special leave' — Leave under R. 350.

The leave under R. 350 is a 'special leave' which has got to be mentioned in form No. 7. [Para 2]

(b) Bombay High Court Rules (O. S.) (1936), form No. 7—Provisions of, whether mandatory.

The requirements of form No. 7 annexed to the High Court Rules are absolutely mandatory by virtue of the provisions of R. 344 and a notice of motion not complying with these requirements is liable to be dismissed. [Paras 3 & 4]

*M. V. Desai and H. D. Banaji*—for Plaintiff.

*K. M. Munshi* (for Nos 1, 2 and 3) and *M. P. Amin and J. M. Shelat* (for No 4) — for Defendants

**Order.**—A preliminary point has been urged in this notice of motion by Mr. Munshi for the defendants that the notice of motion is not in form No. 7 annexed to the High Court Rules and that it should, therefore, be dismissed. The plaintiff took out this notice of motion on 31st October 1946, and obtained from my brother Blagden leave under High Court R. 350 to serve notice of motion in terms of the draft produced, returnable on 8th November 1946 An interim injunction in terms of prayer (a) with certain modifications was granted on the same day, and liberty was given to the defendants or any of them to bring on the notice of motion earlier before 8th November 1946, on 48 hours' notice in writing to the plaintiff's attorneys. It appears that the draft of the notice of motion, which was submitted to my brother Blagden that day and which after due engrossment appears to have been served on the defendants, did not make any mention of the fact that leave under R. 350 had been granted by the Court to serve the notice of motion for the particular date It also did not mention the

before 8th November 1946, on 48 hours' notice in that behalf to the plaintiff's attorneys. Mr. Munshi for the defendants has submitted that under R. 344 of the High Court Rules, the notice of motion has got to be in Form No. 7 with such variations as the circumstances may require, and the provisions of R. 344 are mandatory. The plaintiff had obtained leave from the Court under R. 350 and that fact ought to have been mentioned in compliance with the form No 7. In Form No. 7 it has been provided :

> "If special leave has been obtained add as follows: And take notice also that special leave to give this . . . (if so, short) notice for the day and hour appointed has been obtained from (His Lordship Mr. Justice . . . or as the case may be the Prothonotary and Senior Master)"

In so far as the plaintiff had obtained leave under R 350 of the High Court Rules to serve notice of motion for the particular date, *prima facie* it was necessary for him to have mentioned this fact in the notice of motion in accordance with the requirements of Form No. 7.

[2] Mr M. V. Desai for the plaintiff, however, argued that this paragraph was to be added in the Form No. 7 only if special leave had been obtained; and on a reading of the Rr. 345 and 350, he submitted that the words "special leave" were appropriate only to a case where special leave to serve the notice of motion under R. 345 was obtained by the plaintiff from the Court. He submitted that there was no warrant for treating the leave under R. 350 as "special leave" It was ordinary leave which did not require to be specified in Form No. 7 If one reads Rr 345, 347 and 350 *and also reads along therewith* the Form No 7 which has been prescribed, one finds that the words "special leave" which have been used in Form No. 7 have reference not only to the leave under R. 345 but also to leave obtained by the plaintiff under Rr 347 and 350. No doubt R 347 is deleted from the Rule book of late, but a reference thereto is necessary for the purposes of understanding the words which have been used in Form No. 7 "as the case may be the Prothonotary and Senior Master" Leave under R 345 and leave under R 350 were within the province of the Court The Prothonotary and Senior Master could not grant the same When R. 347 was in operation, leave under R 347 was competent to the Prothonotary and Senior Master to grant by reason of R 89 of the High Court Rules which delegated certain work to be done by the Prothonotary and Senior Master Leave under R. 347, if there was nothing more, required by the plaintiff was thus competent to the Pro thonotary to grant If he had granted such leave, that fact was required by Form No 7 to be mentioned therein. Otherwise the words "as the case may be the Prothonotary and Senior Master" would not have been contained in Form No. 7.

the special leave as submitted before me by Mr. M. V. Desai, viz, the special leave contemplated by R. 345 only. The words "special leave" in Form No. 7 were meant to include not only special leave under *R. 345* but also the leave which was granted by the Prothonotary and Senior Master under R. 347. If this is so, I can- . . . Mr. M. V. Desai that

under R. 345 only. It was also urged by Mr. M. V. Desai that leave under R. 350 to serve notice of motion for a particular date was absolutely unnecessary to be applied for or to be granted by the Court if R. 345 did not come into operation at all. He urged that in this particular case the notice of motion was made returnable on 8th November 1946, which would certainly afford the defendants more than four clear days after the service of the notice of motion . . .

leave under R. 350 absolutely . . .
cases where it would not be absolutely . . .

[5] Sub-section 23 (2), Bombay City Police Act, 1902, as amended by the City of Bombay Police (Amendment) Act, 1942, provides:

"The Commissioner of Police may also, whenever and for such time as he shall consider necessary for the preservation of the public peace or public safety by a notification publicly promulgated or addressed to individuals, prohibit :

(a) the carrying in any public place of :

(i) swords, spears, bludgeons, guns, knives, sticks, or lathis, or

(ii) any other weapon which is capable of being used as a weapon of offence.

(b) the carrying, collection and preparation of stones or other missiles or instruments or means of casting or impelling missiles."

[6] The 1942 Amending Act substantially enlarged the scope of sub-s. 23 (2), since formerly the words which followed the specified weapons, were, "or any other offensive weapon," which words, as the English cases show (see for example (1822) Russ & Ry. 492[1] and (1831) 1 M. & R. 70[2]) give rise to a consideration of the circumstances in which articles such as a stick and a crutch, which are not intrinsically offensive weapons, can be held to be such. But on a construction of sub-s. 23 (2) as amended, it is now apparent that it is the intention of the Legislature that all the specified articles including knives, are to be regarded as weapons, "capable of being used as a weapon of offence," and it is, in our opinion clear, that anything which is normally designated as a knife, the condition of which renders it capable of being used as a weapon of offence, falls within the class of objects which may be prohibited.

[7] By S. 127, Bombay City Police Act, 1902, it is provided that whoever contravenes a prohibition made under sub-s. 23 (2) is punishable with imprisonment for a term which may extend to one month or with a fine which may extend to Rs. 100 or with both, but by the City of Bombay Police (Amendment) Act, 1946, the penalty of imprisonment was enlarged to one year and it is provided that the minimum sentence which is to be passed in any such case shall be four months except for reasons to be recorded in writing.

[8] On 30-7-1946, the Commissioner of Police promulgated an order which so far as it is material is as follows:

*"I hereby prohibit under S. 23 (2), (a) and (b),* Bombay City Police Act, 4 [IV] of 1902, in the Greater Bombay for a period of one month from 1-8-1946 any person—not being a person in the service or employment of the Crown, required by his superiors or by the nature of his duties to carry weapons—from carrying swords, spears, bludgeons, guns, knives, sticks, lathis or any other similar weapon which is capable of being used as a weapon of offence in any public place in the Greater Bombay."

[9] Except for the introduction of the word "similar" before the word "weapon," this order follows verbatim the language of the amended sub-section, and this order which was originally to be in force for one month has been extended from time to time by monthly periods and is still in force.

[10] On behalf of the three accused, counsel who have adopted each other's arguments, have made various submissions against the validity of the convictions passed in these cases. These submissions can be summarised as follows: (1) that the order of the Commissioner of Police was not promulgated in accordance with S. 137 of the Act, (2) that there is no right to stop and search anybody in a street and that accordingly a conviction resulting from the subsequent arrest is invalid : (3) that a "street" is not a public place having regard to the definitions contained in S. 2 of the Act, (4) that to carry a weapon means to display it openly and that having a knife folded in a closed position in a pocket is not "carrying" within the meaning of the section or the order.

[11] With regard to the first of these submissions, the learned Advocate-General, who appears on behalf of Government, stated before us that the order of the Commissioner of Police has been posted at street corners in various parts of the city and has been proclaimed at various places by beat of drum. He had in Court a police officer who was prepared to prove this, and on this statement by the Advocate-General being made, counsel for the accused very properly did not press this point further, especially as it is a matter of common knowledge that the orders of the Commissioner of Police have been announced in some of the newspapers of this city, one of the extention orders being in fact included in the newspapers as a news item on the day on which this case was argued before us. In our opinion promulgation within the meaning of S. 137 has undoubtedly taken place.

[12] With regard to the second submission, without embarking upon any elaborate discourse on the nature of police powers under S. 23 of the Act it is only necessary to say that even if an irregularity had taken place in the method of obtaining proof that an offence has been committed, it would be no reason for setting aside the conviction.

[13] With regard to the third submission, a street is defined in S. 2 of the Act as follows :

" 'street' shall mean any road, footway, square, court alley or passage, whether a thoroughfare or not, to which the public have permanently or temporarily a right of access."

And a "public place" is defined as:

" 'Public place' shall include the foreshore, the precincts of every public building or monument, and all

[14] Be that as it may, it seems to be the case that whatever uncertainty there may still exist on the question whether the offence of contempt may be committed by a publication at a time when proceedings are imminent, but not yet begun, there is not a single decision, English or Indian, which has gone the length of holding that the offence may be committed even if the alleged offender had no knowledge or had no reasonable grounds for believing that proceedings were about to be launched So to hold would in our judgment be an unwarrantable extension of the law of contempt in such cases

[15] Turning to the facts of the present case, we may state at once that there is nothing before us to show that the respondents knew or should have known that a proceeding was about to be started in connection with the alleged Harrison Road incident The learned Chief Presidency Magistrate, after referring to the fact that the matter was under police investigation from before the date of arrest, no doubt states that "it was obvious that a case would in all probability be started' Giving the fullest effect to this statement, we are still unable to hold that this is sufficient to prove either actual knowledge of or reasonable grounds for believing in the imminence of any criminal proceedings On the other hand, we have the affidavits of the respondents that none of them was at all aware or had any grounds for believing that any proceeding was pending or was about to be instituted in respect of the said incident We fully accept their statements We are also satisfied from the affidavit filed on behalf of the editor that not only had he had no such knowledge or belief at the time of the writing or the publication of the article complained of, but that the real object was to press upon the Government the urgent necessity of taking steps to bring the alleged culprits to trial From the various instances referred to in the affidavit, we cannot say that there was much to encourage the hope or belief that Government would take any action, not to speak of prompt action It is further pointed out in this connection that while the allegations in the newspapers in respect of the Harrison Road affair included charges not only of rape but of other offences, such as robbery, assaults, etc, the actual arrest of the two policemen was only for the offence of rape We do not think, therefore, that by publishing the article in the Calcutta Weekly Notes on 21st April without any knowledge of the fact which was announced only on the following day by the Chief Minister in the Bengal Legislative Council that the two policemen had been arrested and would be sent up for trial, and without any reasonable grounds to believe that this had been or would be done, either the editor or the printer or the publisher can be held to have committed any contempt of Court

[16] In this view of the matter, it is not necessary to consider whether the article or the particular passage complained of would have amounted to contempt of Court if it had appeared after the proceedings had commenced before the Chief Presidency Magistrate Speaking for myself, I must, however, point out that there is absolutely no justification for the view expressed by Mr Palmer that there was any statement made, 'positively or otherwise, that the alleged occurrence had actually taken place or that the accused were guilty It will be seen that the reference to the Harrison Road incident in the article was made only as statement of a news item, the actual words used being, ' "

of arme
ment or
founded

[17] The result is that in our opinion no case has been made out against the respondents, and the Rule must be discharged and we order accordingly

[18] **Roxburgh J** —I agree I would only add that while I accept that the writer s bona fide object was to press that proceedings should be taken against any person who after an enquiry *ought to be sent up for trial and to that extent* I accept that some of the matters referred to in the affidavits moved, in the opinion of the writer, justified his anxiety and fear that proceedings would not be taken I certainly dissociate myself from any implied criticism of alleged acts or omissions of the Government We are not in possession of sufficient material nor is it proper for us either in these proceedings to express any opinion on the matter I also am unable to accept the criticism of Mr Palmer s letter in so far as my learned brother is of opinion that the article in substance and in fact would not be a clear contempt had there been pending proceedings Not only is there mention that news had come of the incident at 100 Harrison Road but a number of a very offensive terms are used about the police in the alleged proceedings and later in the article a very clear and emphatic statement that "armed thugs dressed in cynical authority have unfettered licence to break at will into decent Calcutta homes and satisfy their bestial lust"

[19] The writer of such a comment in my opinion is not in a position to say that it is not assumed that the incident at 100, Harrison Road had, in fact, taken place.

[20] On the matter of the law on contempt, I would like to add a reference to the case in (1906) 1 K. B. 32.[9] The judgment was delivered by Wills J. who also has delivered the much discussed judgment in (1903) 2 K. B. 432.[1] It illustrates what was the principle that was being investigated in the two cases. In (1903) 2 K. B. 432[1] the question was whether a superior Court had jurisdiction to punish for contempt or proceedings in the lower Court or what we would call in the committing Court. In (1906) 1 K. B. 32[9] a further difficulty arose in that the proceedings in the committing Court might, according to the circumstances, have been committed for trial to Quarter Sessions instead of to the Assizes, so that some of the reasons given in (1903) 2 K. B. 432[1] for holding that the superior Court had power to punish would not apply in that case. I would also add what, I think, has been made sufficiently clear by my learned brother, that in (1910) 103 L. T. 636,[3] which is quoted as an authority that custody and knowledge of custody or imminence of proceedings is a sufficient element to give rise to proceedings for contempt, it was emphasised that the custody was on a warrant issued by a Magistrate on a sworn information and the newspaper concerned certainly had knowledge of the facts because it had itself published previously news of the arrest of Crippen in Quebec. When it is said that there was knowledge in that case that proceedings were imminent, it has to be taken in the light of this context. In the particular case there had been a Magistrate's warrant and arrest under the Feudatory Offenders Act. It followed inevitably that Crippen would be placed before the Magistrate who had issued the warrant. Knowledge of the proceedings and knowledge that they were imminent was therefore clear, and the imminence was of a very certain character.

**Akram J.** — In the circumstances in which the article appears to have been published I agree in the order which has been made.

D.S. *Rule discharged.*

## A. I. R. (34) 1947 Calcutta 418 *[C. N. 129.]*

SEN J.

*Emperor* v. *Gouranga Chandra Pal* — *Accused.*

Criminal Ref. No. 26 of 1947, Decided on 18th April 1947, made by Sessions Judge, Dacca.

**(a) Defence of India Rules (1939, as amended in 1945), R. 119—Failure to publish order as required by R. 119 (1), if fatal to prosecution.**

In view of the amendments of R. 119 in 1945 a failure to publish an order, made in pursuance of the Rules, in accordance with the provisions of R. 119 (1) would not necessarily be fatal to a prosecution. It would be open to the Crown to prove that the accused had information of the order aliunde : 32 A. I. R. 1945 Bom. 368; 33 A.I.R. 1946 Pat. 1 (F.B.) and 32 A.I.R. 1945 Nag. 218, *held no longer good law* ; 31 A. I. R. 1944 Bom. 259, *Approved.* [Para 7]

**(b) Defence of India Rules (1939, as amended in 1945), R. 119 — Order made under rules not published as required by R. 119 (1)—Onus is on prosecution to prove that accused had knowledge of order—Knowledge—Proof of.**

Where an order made under the rules has *not been* duly published in accordance with the provisions of R. 119 (1) no presumption of knowledge of the order on the part of the accused can arise. The onus therefore is on the prosecution to prove actual knowledge of the order on the part of the accused. The fact that the order had been proclaimed by beat of drum (a mode of publication not in accordance with the manner of publication decided upon by the authority making the order) in the locality where the accused had his shop is not sufficient to show that the accused had actual knowledge of the order. Proof that the accused had reasonable opportunity of knowing of the order would be entirely insufficient to fix the accused with liability. [Para 8]

*Cases referred* :—

1. ('46) 47 Cr. L. J. 123 : 32 A. I. R. 1945 Bom. 368 : I.L.R. (1945) Bom. 681: 221 I. C. 239, Leslie Gwilt v. Emperor.
2. ('46) 47 Cr. L. J. 497: 33 A.I.R. 1946 Pat. 1: 24 Pat. 781: 223 I. C. 263 (F.B.), Mahadeo Prasad v. Emperor.
3. ('46) 47 Cr. L. J. 400 : 32 A. I. R. 1945 Nag. 218 : I. L. R. (1945) Nag. 762 : 222 I. C. 280, Babulal v. Emperor.
4. ('45) I.L.R. (1945) Bom. 103: 31 A. I. R. 1944 Bom. 259 : 220 I. C. 486, Imperator v. Rayangouda Lingangouda.

*Debabrata Mukherjee* — for Accused.
*Harideb Chatterjee* — for the Crown.

**Order.** — This is a reference made by the Sessions Judge of Dacca recommending that the conviction and sentence passed on one Gouranga Chandra Pal be set aside. The facts which need be stated for the purpose of this reference briefly are as follows: Gouranga Chandra Pal is a dealer in mustard oil at Mirkadim within the jurisdiction of Police-station Munshiganj. The case against him is that he did not submit certain fortnightly returns and did not maintain a register or any accounts showing receipts, sale and the daily stock position with respect to mustard oil, thereby committing an offence made punishable under R. 81 (4) of the Defence of India Rules.

[2] Under R. 81 of the Defence of India Rules, the Central or Provincial Government may make certain orders of the nature mentioned in the rule. If any person contravenes an order made under the rule he is punishable under sub-r. (4) of R. 81. The case for the prosecution is that the District Magistrate, on 5th April 1946, made an order under R. 81 whereby he directed that dealers in mustard oil should submit the return and maintain the register mentioned above. The allegation against the accused is that he contravened the order and did not submit the return or maintain the register.

[3] The defence taken was that the order passed by the learned Magistrate was not duly promulgated in accordance with the provisions of R 119 of the Defence of India Rules The accused did not contend that he had obeyed the order passed by the learned Magistrate The trial Court has found that the order of the District Magistrate was not duly promulgated in accordance with the provisions of R 119, but it has held that there was a compliance with the "spirit" of the rule and that the accused knew of the existence of the order and was therefore liable to punishment under R 81 (4) It thereupon convicted the accused and sentenced him to pay a fine of Rs 100, in default to undergo rigorous imprisonment for a period of three months

[4] The Sessions Judge was moved by the accused and he has referred the case to this Court and recommended that the conviction and sentence should be set aside The ground on which he has recommended this is that the order passed by the learned District Magistrate was not promulgated in accordance with the provisions of R 119 and that the failure to observe the provisions of R 119 rendered the prosecution and conviction of the accused bad The learned Judge has not at all dealt with the question *whether the accused knew of the order or not* He recommends the setting aside of the order of conviction and sentence on the sole ground that the promulgation of the order was not in accordance with R 119

[5] Rule 119 provides, inter alia, that where an authority, officer or person makes any order in writing in pursuance of the Defence of India Rules he shall in case of an order of a general nature or affecting a class of persons publish notice of such order in such manner as may in his opinion be best adapted for informing the persons whom the order concerns Now, in this [illegible]

Civil Supplies Now this order was not published on the notice board but the substance of the order was proclaimed by beat of drum in the locality where the accused and others had their shops The publication, therefore, obviously was not in accordance with the manner of publication decided upon by the District Magistrate who according to R 119 was the only person or authority competent to decide the manner of publication

[6] The point which arises for consideration is whether the failure to publish the order in the manner prescribed by the District Magistrate absolves the accused from obeying it A large number of cases have been placed before me and the trend of decisions is that the failure to publish an order made under R 81, Defence of India Rules, in accordance with the provisions of R 119 would be fatal to a prosecution of a person disobeying such order In this connection I would refer to the following cases: 47 Cr L J 123[1] This was a decision of the High Court of Bombay 47 Cr L J 497[2] This was a decision of a Full Bench of the High Court, Patna 47 Cr L J 400[3] This was a decision of the High Court Nagpur In these cases, the exact point which has arisen in the present case did not arise for decision, but there are "obiter dicta" which express the view that failure to publish the order in accordance with the provisions of R 119, Defence of India Rules would be fatal to the prosecution As against these decisions, there is a decision of Bombay High Court I L R (1945) Bom 103[4] In that case it was held by Macklin J that failure to carry out the provisions of R 119 would not render a prosecution bad but would merely deprive the prosecution of a convenient method of poof of knowledge in the accused which is afforded by R 119 and the view seems to have been held that if the accused actually knew of the order he would be liable for any disobedience thereof in spite of any non compliance with the provisions of R. 119 The other cases mentioned above took a contrary view Since these decisions were made R 119 has undergone amendments The amendments have not been noticed either by the trial Magistrate or the Sessions Judge I must not be taken to be blaming them for not knowing of these amendments It is extremely difficult for any Court to apprise itself of the frequent amendments made with respect to the Defence of India Rules The amendments were however brought to my notice and they render the discussion of the case law on the subject unnecessary Rule 119 as it originally stood provided that where an order was published in accordance with sub r. (1) of R 119 the persons concerned shall be deemed to have been duly informed of the order The rule as it now stands provides that if in the course of any judicial proceeding a question arises whether a person was duly informed of an order made in pursuance of the Defence of India Rules [illegible] with sub r (1) shall be conclusive [illegible] he had information of the order [illegible] to comply with sub r (1) shall [illegible] by other means that h[illegible] was [illegible] informed [illegible] shall not affect the validity [illegible] order [illegible] Rule 119 as amended [illegible] 21 7 1945 No [illegible] ed on 2[illegible]

[7] In view of these amendments, a failure to observe the provisions of sub-r. (1) of R. 119 would not necessarily be fatal to a prosecution. It would be open to the Crown to prove that the accused had information of the order *aliunde*. It has also been provided that the validity of the order would in no way be affected by any defect of its publication or promulgation.

[8] In the present case as I have said before, the order has not been published in accordance with the provisions of R. 119 (1). The question which arises now is whether the prosecution has succeeded in proving by other means that the accused was informed of the order. I need hardly point out that the onus is on the prosecution to prove that the accused had knowledge of the order, inasmuch as no presumption of knowledge can arise where there has not been a compliance with the provisions of R. 119, sub-r. (1). The learned Sessions Judge has not considered this matter at all because he was not aware of the amendments to R. 119 and he dealt with the case on the footing that non-compliance with the provisions of R. 119, sub-r. (1) rendered the prosecution bad. The learned Magistrate has to some extent considered the question of the accused's knowledge of the order, but the fact of the recent amendments not being known to him has had the effect of rendering his consideration of this question somewhat nebulous and unsatisfactory. In his judgment he says in one paragraph :

"The defence does not contend so much that the accused was not aware of the order or that he had no opportunity of knowing the same as that there was no legal promulgation inasmuch as the District Magistrate's direction was not categorically complied with to the letter."

In another part of his judgment he says this :

"The spirit of this rule (R. 119) however as I have pointed above is to see whether the accused knew or had an opportunity of knowing the order * * * It cannot however be disputed that the plea of non-publication indirectly implies the plea of want of knowledge on the part of the accused. Can it therefore be argued that the accused had no knowledge of the order? The answer must be in the negative * * * All that has to be seen is whether the accused had a reasonable opportunity of knowing the order."

In another part of the judgment he says :

"I am perfectly satisfied that the accused had full knowledge of the order in this particular case which was promulgated in the locality in the best way possible * * * ."

These remarks of the learned Magistrate indicate a certain amount of confusion of thought. He seems to think that even if the order has not been published in accordance with the provisions of R. 119, sub-r. (1) the accused would be liable if he had a "reasonable opportunity of knowing the order." This is entirely wrong. If the order has not been duly published it is incumbent upon the prosecution to prove actual knowledge on the part of the accused of the order. Proof that the accused had reasonable opportunity of knowing of the order would be entirely insufficient to fix the accused with liability. The point therefore which has to be decided in this case is whether the accused had actual knowledge of the order. The learned Magistrate says in one part of his judgment that he is perfectly satisfied that the accused had such knowledge; but he gives no adequate reasons for this view except saying that the order was promulgated by beat of drum in the locality where the accused had his shop or where he had been carrying on his business for about six months before the case was started. I have been through the evidence with a view to ascertain whether there is anything there which justifies a definite finding that the accused had, in fact, knowledge of the order. From the evidence as recorded, it seems that this point never occurred to the prosecution and no evidence has been given to show that as a matter of fact the accused had knowledge of this order. Evidence has been given regarding the mode of publication, namely, by beat of drum in the locality. It is possible that the accused may not have been present when the order was promulgated in this manner. The onus is on the prosecution to prove actual knowledge on the part of the accused. That onus the prosecution has failed to discharge by adducing any evidence on the point. The learned Magistrate has also misguided himself by thinking that "an opportunity of knowing of the order" would amount to actual knowledge of the order.

[9] In view of what has been said above, I must accept the recommendation of the learned Sessions Judge though for reasons other than those stated in the letter of reference. I accordingly set aside the order of conviction and sentence and direct that the fine if paid be refunded.

G.N. *Conviction set aside.*

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## A. I. R. (34) 1947 Calcutta 420 *[C. N. 130.]*

SEN J.

*Hari Ram Agarwalla — Accused — Petitioner* v. *Emperor.*

Criminal Revn. No. 1345 of 1946, Decided on 6-3-1947.

(a) Cotton Cloth and Yarn Control Order (1943), S. 23—Issue of warrant without sanction — Subsequent submission of charge sheet—Validity of proceedings.

Where a Magistrate commences the prosecution of a case by issuing a warrant of arrest, the submission of a charge sheet subsequently would not have the effect of altering the date of the initiation of the prosecution; and if the prosecution has been commenced without sanction the entire proceedings are in contravention of S. 23 and must be regarded as null and void *ab initio* : (32) A. I. R. 1945 F. C. 16, *Rel. on.* [Para 6]

(b) Criminal P C (1898), S 234 (1) — Accused charged with more than three offences under S 12 (6), Cotton Cloth and Yarn Control Order—Trial illegal

Where the accused was charged under S 12 (6), Cotton Cloth and Yarn Control Order 1943, with [illegible]

[illegible] Com, Cr P C, S 234 N 1 Pt 1.

*Bireswar Chatterjee and Parimal Mukherjee* — for Petitioner

*Jogeschandra Sinha* — for the Crown

**Order** — This rule must be made absolute The proceedings have been illegal from beginning to end The petitioner has been charged with having refused to sell cloth thereby acting in contravention of the provisions of S 12 (6), Cotton Cloth and Yarn Control Order of 1943 This order was passed in the exercise of powers conferred upon the Central Government by sub r (2) of R 81, Defence of India Rules The disobedience of this order is made punishable by R 81 (4), Defence of India Rules.

[2] Now, S 23, Cotton Cloth and Yarn Control Order provides as follows

"No prosecution for the contravention of any of the provisions of this order shall be instituted without the previous sanction of the Provincial Government"

[3] In this case the petitioner was arrested by the police without any warrant being issued by any Court ... *

[4] The next thing that happened is this The officer in charge of the police station for some reason or other released the petitioner on bail This did not meet with the approval of the Deputy Superintendent of Police, Enforcement Branch, and he sent a report of the Sub-Divi [illegible]

following effect: [illegible]

[5] It is clear from this order that a warrant of arrest was being issued by the Sub Divisional Magistrate acting as a Court and he could only do this upon taking cognizance of the offence alleged to have been committed by the petitioner Up to this date, there was no sanction obtained from the Provincial Government or the District Magistrate. [illegible]

a charge sheet was submitted against the petitioner and the Sub Divisional Magistrate sent [illegible]

arises for decision is whether the obtaining of the sanction on 1 7 1945 could validate the previous and subsequent proceedings which resulted in the conviction of the petitioner In my opinion it could not and for this purpose I rely upon the decision of the Federal Court in 49 C W N (F R) 59[1]

[6] The learned advocate appearing for the Crown contends that the prosecution had not commenced before the submission of the charge-sheet and that as sanction had been obtained from the District Magistrate befor the submission of the charge sheet there has been no illegality I am unable to accept this view The prosecution of a person commences as soon as the Court takes cognizance of the offence alleged against him. Unless the Magistrate had taken cognizance the Magistrate could not have issued a warrant of arrest on 11 6 1945 The learned Magistrate had therefore rightly or wrongly, commenced the prosecution of this case on 11 6-1945 The submission of a charge sheet subsequently would not have the effect of altering the date of the initiation of the prosecution. The prosecution having commenced without sanction the entire proceedings are in contravention of S 23, Cotton Cloth and Yarn Control Order and must be regarded as null and void *ab initio* I therefore quash all the proceedings for want of jurisdiction and direct that the fine paid by the petitioner be refunded I express no opinion as to whether proceedings may be taken afresh or not

[7] The next objection taken on behalf of the petitioner relates to the misjoinder of charges. Here again there has been an illegality The charge against the petitioner is as follows [illegible]

* Passage deleted by subsequent order of the learned Judge dated 11 3-1947.

1 namely that you on or about the [illegible] 1351 corresponding to 27 2 1945 at Kariali Mashaldah Bazar refused to sell clothes (sar [illegible] nd [illegible]) to

Umacharan Karmakar and Rakhal Chandra Sarkar without sufficient cause and thereby committed an offence punishable under S. 81 (4), Defence of India Rules and within my cognizance."

[8] Section 233, Criminal P. C., states that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately. There are exceptions to this rule, the exceptions being provided in Ss. 234, 235, 236 and 239 of the Code.

[9] Section 234 says *inter alia* that three offences of the same kind committed within the period of one year may be charged together. So the offences committed with respect to the refusal to sell cloth to Md. Yusuf, Abdul Kayem and Moslem Mondal having been committed within the course of one year may be tried together at one trial. It would be better if at such a trial there were three separate heads of charges, but even if there were not three separate heads of charges, it would not in my opinion amount to an illegality. Here, however, the petitioner has not been charged only with these three offences but also with the offences mentioned in the second and third counts of the charge, that is to say, the offences relating to the refusal to sell cloth to Umacharan Karmakar and Rakhal Chandra Sarnakar at two different dates, namely, 24th February and 27-2-1945. This is clearly illegal and the trial is therefore vitiated by reason of this illegality. On this ground also the order of conviction and sentence would have to be set aside. But it is not necessary for me to do so inasmuch as the proceedings are void *ab initio* and must be quashed.

V.R. *Proceedings quashed.*

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**A. I. R. (34) 1947 Calcutta 422** *[C. N. 131.]*

CHAKRAVARTTI AND ELLIS JJ.

*Kamini Mohan — Petitioner* v. *Mohan Lal Bayeed — Opposite Party.*

Civil Rule No. 146 of 1946, Decided on 15-4-1947, from order of Addl. Dist. Judge, Dinajpur, D/ -4-10-1945.

Bengal Tenancy Act (8 [VIII] of 1885), S. 153 (b) — "Amount claimed in the suit" — Decree passed under S. 144 — Bengal Tenancy Act (8 [VIII] of 1885), S. 144.

In a suit framed under S. 144 there is not one amount claimed. The scheme of the section appears to be that the Legislature only enables the landlord to combine a number of claims in one suit instead of leaving him to the ordinary procedure of bringing separate suits; but by such provision the claims in respect of the different tenancies are not unified or consolidated and made one single claim. Therefore the phrase "amount claimed in the suit" in S. 153 (b) must be read, in the case of a decree passed under S. 144, as meaning the amount claimed in respect of the tenancy for or in relation to which the decree in question was passed. [Paras 9 and 11]

*Rohini Kanta Ghose* — for Petitioner.
*Sanat Kumar Chatterji* — for Opposite Party.

**Chakravartti J.** — This rule raises a somewhat interesting question of law under S. 153, Bengal Tenancy Act. The material facts are simple and may be briefly summarised as follows: The opposite party brought a suit, being Suit No. 130 of 1942, in the Court of the Second Munsif of Dinajpur Sadar under S. 144, Bengal Tenancy Act and claimed to recover from the petitioner a sum of Rs. 46-2-3 as rent due on account of one tenancy and a further sum of Rs. 23-8-3 as rent on account of another tenancy. Decrees in accordance with S. 144, Bengal Tenancy Act were in due course passed and the opposite party put the decree which he obtained in respect of the first tenancy into execution, and purchased the tenancy himself. Thereupon, the petitioner made an application under S. 174 (3), Bengal Tenancy Act for having the sale set aside on the usual grounds, viz., suppression of notices and sale at an abnormal low price. This application succeeded and by an order passed on 15-1-1945, the learned Second Munisf of Dinajpur set aside the sale. He held that the sale proclamation had been fraudulently suppressed.

[2] Against that order an appeal was preferred by the opposite party to the District Judge of Dinajpur which came to be disposed of by the learned Additional District Judge. A preliminary objection was taken before him on behalf of the petitioner to the effect that having regard to the provisions of S. 153 (b), Bengal Tenancy Act, no appeal lay at all. The learned Judge overruled this contention in the view that in the case of a suit brought under S. 144, Bengal Tenancy Act, 'the amount claimed in the suit," as contemplated by S. 153 (b), was the sum total of the several amounts claimed in respect of the several tenancies. Since, in the present case, the sum total of the amounts claimed in respect of the two tenancies exceeded Rs. 50, the learned Judge held that S. 153 was no bar to the maintainability of the appeal. He then proceeded to deal with the appeal on the merits and held that suppression of the sale proclamation had not been proved. In the result he allowed the appeal and set aside the order of the learned Munsif.

[3] Against that appellate order the petitioner obtained the present rule which was issued on only one ground. That ground is to the following effect:

"For that the learned appellate Court ought to have held that the appeal from the decision of the Munsif who has got final jurisdiction in respect of the matter in suit was not competent in law."

[4] It is to be noticed that taken by itself, S. 174, Bengal Tenancy Act gives a right of appeal against every order setting aside or refusing to set aside a sale. But it has been established by decisions of this Court that S. 174 (5) is

subject to S 153 Accordingly, the question involved in the present case must be decided by reference to the terms of the latter section, read, however, with those of S 144.

[5] Before dealing with the question which falls to be decided in this rule, it will be convenient to set out the relevant portions of Ss 153 and 144. Section 153, so far as is material, provides that

It is not necessary to set out the exceptions to this section which do not come into play in the present case.

[6] From the terms of S 153 set out above it will appear that where the decree or order is passed by a Munsif who has been specially em

... suit does not exceed Rs. 50" The question therefore is, what was "the amount claimed in the suit" in the present case?

[7] On that question it is pertinent to refer to the terms of S 144 (2) which, so far as is material, provides as follows

"A landlord may institute one suit in respect of the rent of more than one tenancy, if the tenancies in respect of the rent of which a suit is brought are held in similar right and equal status by the same tenant under him Provided that (i) the claim in respect of each

[8] What is contended on behalf of the opposite party is that although a suit under S 144, Ben Ten Act, may comprise claims in respect of several tenancies, it is in law one suit, as the Legislature expressly states From that premises it is further argued that the amount claimed in such a suit must necessarily be the aggregate of the several amounts claimed in respect of the different tenancies In short, the argument is that since there is only one suit, there can in law be but one amount claimed in the suit, although there may be a special provision for passing separate decrees or making the claim in a distributive manner

[9] We are unable to accede to this contention In the first place it would appear from the terms of S 144 itself, which have been set out already, that there is no one amount claimed in such a suit The section enacts quite clearly that there shall be a separate claim in respect of each tenancy Equally clear is the provision that separate decrees shall be passed If anything further was needed to emphasise the plurality of the claim in such a suit that is provided by the further provision that separate court fees must be paid in respect of every claim. In view of these provisions, it is, in our opinion, quite impossible to hold that there is, in a suit framed under S 144, any one amount claimed The scheme of the section appears to be that the Legislature only enables the landlord to combine a number of claims in one suit instead of leaving him to the ordinary procedure of bringing separate suits but by such provision the claims in respect of the different tenancies are not unified or consolidated and made one single claim We are accordingly of opinion that if S 153 Ben Ten. Act, is sought to be applied to a suit framed under S 144, there will

... if one refers to the terms of S 153 itself one gets additional support for the view that the sum total of the amounts claimed in respect of several tenancies in a suit under S 144 cannot possibly be the amount claimed in the suit' within the meaning of the former section It should be remembered that S 153 deals with the appealability or otherwise of decrees and orders When sub s (b) of S 153 speaks of "the amount claimed in the suit" this expression must obviously be read and understood by reference to the other expression occurring in the section, viz, 'the decree or order passed by any other Judicial Officer" In the case of decrees made in a suit under S 144 the appealability of each decree is being dealt with by the sub section. To make the point clear in a suit framed under S 144, there would be, under the terms of that section, not one decree but several decrees, and S 153, when it is sought to be applied to decrees passed under S 144 must be applied to the different decrees separately. The decree or order contemplated by S 153 (b), in such a case would be one or other of the decrees passed under S 144 and 'the amount claimed in the suit" would be the amount claimed with respect to the particular tenancy for the rent of which the particular decree was passed ... deny that ... is not the ... together, ... of them The construction contended for by the opposite party would lead to the result that while the decree or order contemplated by S 153 in the case of a suit brought under S 144, would be one or ... of the several decrees yet 'the am... the

suit" would be not the amount claimed in respect of the tenancy for which that decree was passed, but the sum-total of all the amounts claimed in respect of all the tenancies. Such a construction, in our view, is plainly untenable. When the matter for enquiry is whether one of the several decrees is appealable, the relevant "amount claimed in the suit" can only be the amount of the claim with respect to which that particular decree was passed and not the arithmetical total of that amount and other amounts with which the decree in question has no connexion.

[11] In our opinion, the phrase "amount claimed in the suit" in S. 153 (b), Ben. Ten. Act, must be read, in the case of a decree passed under S. 144, as meaning the amount claimed in respect of the tenancy for or in relation to which the decree in question was passed.

[12] Upon that construction of the section, there was clearly no appeal in the present case to the lower appellate Court. The amount claimed in respect of the tenancy for which the decree executed by the opposite party was passed was only Rs. 46-2 3. That being so, it was hit directly by the section and it was not contended before us that any of the exceptions to S. 153 had any application.

[13] In the result, the Rule is made absolute. The order of the learned Additional District Judge dated 4-10-1945, is set aside and that of the learned Munsif restored. We make no order as to costs.

**Ellis J.**—I agree.

V.R. *Rule made absolute.*

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## A I. R. (34) 1947 Calcutta 424 *[C. N. 132.]*

DAS J.

*Ananta Kumar Shyam Roy — Judgment-debtor—Appellant* v. *Surendra Kumar Mitra —Decree-holder—Respondent.*

Appeal No. 71 of 1946, Decided on 31-3-1947, from appellate order of Addl. Dist. Judge, Second Court, Dacca, D/- 27-11-1945.

(a) Civil P. C. (1908), S. 48 — Presentation of execution application.

It is the presentation of the application within the time limit prescribed which matters. If the presentation is irregular at its inception and the irregularity is subsequently cured the application so presented relates back to the date of presentation. [Para 4]

('44) Com. C. P. C., S. 48, N. 6 Pt. 1.

(b) Civil P. C. (1908), S. 48 — Decree transferred for execution — Application to transferee Court within time—Order of transfer and transmission of certificate beyond 12 years.

Where a decree-holder applies for transfer of decree to another Court for execution and then applies to the transferee Court for execution within 12 years, the fact that the order for transfer of decree is passed and that the certificate of non-satisfaction is sent to the transferee Court after the expiry of 12 years does not make the application presented to the transferee Court barred by S. 48. The period of limitation prescribed in S. 48 cannot be curtailed by delays which may be caused by the machinery provided for in the Code for the transfer of decrees : 32 A. I. R. 1945 Cal. 141, *Foll.* [Para 4]

('44) Com. C. P. C., S. 48, N. 2.

*Cases referred :—*

1. ('28) 15 A. I. R. 1928 Mad. 496 : 109 I. C. 404, Nanjunda Chettiar v. Nallakaruppan Chettiar.
2. ('33) 56 Mad. 692 : 20 A. I. R. 1933 Mad. 627 : 144 I. C. 923, Modali Ademma v. L. Venkata Subbayya.
3. ('10) 35 Mad. 588 : 8 I. C. 852, Arimuthu Chetty v. Vyapuripandaram.
4. ('31) 35 C. W. N. 308 : 18 A. I. R. 1931 Cal. 649 : 134 I. C. 944, Lokenath Roy v. Mahim Chandra De.
5. ('97) 20 Mad. 10, Appu Baker Saheb v. Mohidin Saheb.
6. ('44) 79 C. L. J. 110 : 32 A. I. R. 1945 Cal. 141 : 219 I. C. 112, Hosain Ali Raj v. Barisal Rindan Samiti Ltd.
7. ('23) 2 Pat. 909 : 11 A. I. R. 1924 Pat. 120 : 74 I. C. 753, K. B. Dutt v. Taraprasanna Roy.
8. ('85) 11 I. A. 37 : 6 All. 269 (P. C.), Ramkripal Shukul v. Mt. Rupkuari.

*Amarendra Mohan Mitter and Nagendra Mohan Shaha*—for Appellant.
*Subodh Chandra Basak*—for Respondent.

**Judgment.** — This appeal is on behalf of the judgment-debtor. The appellant borrowed money on a mortgage from the respondent and another person. In 1932 a mortgage suit was instituted, being Suit No. 42 of 1932 of the Second Court of the Munsif at Dacca by the respondent against the appellant, the co-mortgagee being added as a pro forma defendant in the suit. On 2 11-1932, the mortgage suit was decreed for a sum of Rs. 868-8-0. The decree directed that the respondent will get a moiety share of the aforesaid sum of Rs. 868-8-0 plus the full costs of the suit which was assessed at Rs. 183-13-9. The pro forma defendant being entitled to the remaining moiety share of Rs. 868-8-0. This decree was executed in 1933 in title execution Case No. 69 of 1933 of the Second Court of the Munsif at Dacca. The respondent decree-holder alone executed that decree. The application for execution is not on record and it is difficult to say what the terms of the said application were. The application, however, was held to be not maintainable by an order dated 10-8-1933. There were several intermediate executions. The last execution case with which we are now concerned was started on an application filed on 4-9-1944, in the 2nd Court of the Munsif at Dacca. On the same date the respondent-decree-holder made an application for transfer of the decree to the sixth Court of the Munsif at Dacca. As this application for transfer remained pending before the Second Court of the Munsif, Dacca and 12 years from the date of the decree was about to expire the respondent decree-holder filed another application for execution in the sixth Court of the Munsif at Dacca.

on 28 10 1944 On 9 11 1944, the Second Court of the Munsif at Dacca made an order for transfer of the decree to the sixth Court of the Munsif at Dacca On 4 12 1944, the certificate of non satisfaction of the decree was signed by the Munsif Second Court at Dacca and the certificate and requisite papers were transmitted to the sixth Court of the Munsif at Dacca on 21 12 1944 The execution then proceeded in the sixth Court of the *Munsif at Dacca The judgment-debtor appellant* objected to the execution of the decree under S 47, Civil P. C, on a two fold ground, namely, that the execution was barred under S 48, Civil P C, and that the execution as laid was not maintainable in view of O 21, R 15, Civil P C These contentions having been overruled by the Courts below, the judgment debtor has come up on second appeal to this Court

[2] Mr Mitter appearing on behalf of the appellant has argued in the first *instance that* the application for execution is barred under S 48, Civil P C. His *argument is that* the transferee Court assumes jurisdiction at the earliest when the order *transmitting* the decree is passed and as in this case the order for transmission was made *on 9 11-1944, the application* for execution filed in the transferee Court became operative on that date and that as this date was beyond 12 years of the date of the decree the *application was barred under* S 48, Civil P. C Mr. Mitter has placed reliance on two decisions of the Madras High Court viz the *case in* A I R. 1928 Mad 496[1] and the case in 56 Mad 692[2] In the *case reported in* A I R 1928 Mad 496,[1] Jackson J observed as follows:

'A Court must obtain jurisdiction by some definite act If the receipt of the decree from the Court which passed it is not the essential act what is it? It is not enough to say that the receipt is discretionary or that the mere despatch is enough, and a Court cannot arrogate jurisdiction to itself It must be held, therefore, that until a Court has received the decree, it has no jurisdiction to entertain an application.'

This view of Jackson J was, however, not accepted in a later decision of the same Court in 56 Mad. 692[2] Where Beasley C J and Bardswell J preferred to follow the view taken by Krishnaswami Ayyar J in 35 Mad 588[3] at p 590 which was to the effect that 'once an order is made sending the decree to another Court for execution that by itself is sufficient to entitle the decree holder to apply to the Court to which the decree is sent for execution"

[3] Mr Mitter contends that according to the view taken in either of these cases the application for execution in the present case would be barred under S 48, Civil P C This no doubt is so, but the view taken by the Madras High Court does not seem to have found favour with our Court In 35 C W N. 205[4] Mitter J relying on the decision in 20 Mad 10,[5] held that omission by the Court which passed the decree to send the certificate of non satisfaction under O 21, R 6, Civil P C 'to the Court to which the decree is transmitted for execution is a mere irregularity and does not affect the jurisdiction of the latter Court to execute the decree In this view, Mitter J directed the execution to proceed in the transferee Court provided the decree-*holder filed the requisite certificate later onbefore* the execution was proceeded with

[4] It may be pointed out that in none of the cases above referred to the applicability of S 48, Civil P C, was directly under consideration Section 48, Civil P C, requires that the application for execution should be presented within 12 years of the date of the decree It is the presentation of the application within the time limit prescribed which matters If the presentation is irregular at the inception and the irregularity is subsequently cured, the application so presented relates back to the date of presentation This view is fully supported by the decision of Henderson J in 79 C L J 110[6] to which Mr Mitter has very fairly and properly drawn my attention That case is on all fours with the facts of the present case The decision as reported does not set out the relevant dates I have myself looked into the records of that case, which are in this Hon ble Court The facts appearing from those records shew that on 11th May 1929 the decree holder obtained a decree in the Court of Small Causes, there were intermediate executions before 12 years had run out on 7th April 1941 as application for transfer of the decree to the money file was filed before the Small Cause Court, while this was pending, the decree holder *filed an application for execution* in the money file on 10th May 1941 This was within 12 years of the date of the decree On 7th June 1941, after 12 years had passed, an *order transmitting* the decree to the money file was made by the Small Cause Court Judge and the certificate of non satisfaction was signed by the Judge on the same date The certificate of non satisfaction and other relevant papers were received in the transferee Court later on 13th June 1941 It was argued that as the order for transfer was made and the certificate of non satisfaction was received beyond 12 years from the date of the decree, the application for execution was barred under S 48, Civil P. C This contention, having been negatived in the Courts below, was repeated before Henderson J The *learned Judge* in overruling this contention observes as follows

"The question is whether the failure of the Court which passed the decree to send it in time is a mere irregularity or whether it affects the jurisdiction ..?.. now if this were a matter af [illegible] the [illegible]diction, it would clearly lead to m [illegible] results.

tion, the parties to the suit are in the position of counter claimants and it can very well be predicated of a defendant in a suit for partition that he is suing for partition. In my opinion the present case is within the ambit of the section.

[13] In 46 Bom. 341,[5] the dwelling house was owned by Bhikaji Balwant, defendant 2, and Gangadhar. The plaintiff had purchased the share of Bhikaji. Defendant 3 had purchased the share of Gangadhar. A suit for partition was filed and a preliminary decree was passed. Thereafter defendant 2 claimed to purchase the share of the plaintiff and defendant 3, under S. 4, Partition Act. The High Court (Macleod C. J. and Shah J.) held that the appellant could not succeed so far as the share of defendant 3 was concerned; the latter though a transferee could not be said to have sued for partition. This case was distinguished in 49 C. L. J. 136[1] and it was observed that it did not appear from the report if defendant 3 (one of the stranger transferees) appeared in the suit and claimed a share in the dwelling house. It was further pointed out that Macleod C. J. based his judgment on the ground that once defendant 2 was allowed to purchase the share of the plaintiff, the suit came to an end and there could be no further question of defendant 2 purchasing the share of defendant 3. It would seem, therefore, that the observations were in the nature of *obiter dicta.* In the case reported in 49 C. L. J. 136,[1] the facts were these. The plaintiff instituted a suit for partition. Subsequent to the passing of the preliminary decree, defendant 9 applied for purchase of the share of the plaintiff as also of defendants 14 to 19 who were stranger purchasers of shares in the dwelling house. The lower appellate Court allowed defendant 9 to purchase the share of the plaintiff but disallowed his claim to purchase the share of defendants 14 to 19. Against this decision, defendant 9 preferred an appeal. In allowing the appeal, Subrawardy J. (with whom Jack J. concurred) observed that:

"Section 4, Partition Act, is a logical sequel of or corollary to S. 44, T. P. Act. The latter Act denies the right of joint possession to a stranger purchaser who is left only with the right to sue for partition. It was felt that the partition of a dwelling house, specially of small dimensions, would divide it into unsuitable parcels and may in some cases introduce undesirable neighbours. The Partition Act of 1893 accordingly came to the rescue of the members of an undivided family and gave them the right to purchase the shares obtained by strangers of the family. It is possible that if two persons outside the family buy two shares of the members of the family and one of them brings a suit for partition, making the other a defendant and if his right to purchase the share of the dwelling house fails on any account, the stranger defendant may yet be given a share in the dwelling house because he does not happen to be a plaintiff in the suit. This is certainly not what the Legislature intended and that one must try to put a reasonable construction on the acts of the Legislature."

His Lordship went on to observe:

"The respondents applied for a Saham in the dwelling house and it will not be stretching too much language of the law to treat the respondents as plaintiffs within the meaning of S. 4, Partition Act. This view is supported by the well-known principle that a party in a partition suit whether a plaintiff or a defendant is at the same time a plaintiff as well as a defendant."

In A. I. R. 1937 Nag. 4[2] Stone C. J. in repelling the contention that S. 4, Partition Act, did not apply as the transferee was a defendant and not a plaintiff observed that bearing in mind the clear intention of the Act where in the course of another suit, the defendant applied to have a partition under the Partition Act, he is correctly described as having "sued" for partition within the meaning of S. 4. In A. I. R. 1941 Pat. 4[3] the facts were somewhat similar. Khush Narain had four sons. The plaintiffs were descendants from one of the sons, defendants 1, 2 were the descendants of another son, defendants 3, 6 were descendants of another son, defendants 7, 8 were descendants from another, defendants were transferees of the share held by defendants 1, 2. It was admitted that there was a previous partition but according to the plaintiff a portion of the dwelling house viz., *Sirighar*, privy and *angan* (court-yard) and passage remained in joint, while defendants 1, 2 alleged that the *Sirighar* belonged to defendants 1, 2 exclusively. The plaintiff prayed for partition of the said joint lands. The lower appellate Court held that the privy, *Sirighar* and the passage were incapable of partition. The plaintiffs appealed and one of the points urged by the plaintiff was that relief should have been given to the plaintiff under S. 4, Partition Act. In dealing with this contention, Dhavle J. observed:

"The section certainly speaks of the transferee suing for possession, but the learned advocate has argued on the authority in A. I. R. 1929 Cal. 269 : 49 C. L. J. 136[1] that in partition suit each party is in the position of a plaintiff as well as of defendant and that, therefore, even if the transferee be on the record as a defendant, and the plaintiff who has a share in the undivided property as a plaintiff, the latter is entitled to avail himself of the provisions of the section. The contention is fully supported by the authority cited by the learned advocate."

From the above discussion it follows that the plaintiff is entitled to relief under S. 4, Partition Act.

[14] In my opinion, therefore, the second point urged by the appellant is not of substance. The appeal accordingly fails and must be dismissed with costs. Leave to appeal prayed for is refused.

V.R. *Appeal dismissed.*

**A I R (34) 1947 Calcutta 429 [C N 134]**

FULL BENCH

LODGE ROXBURGH AND CHAKRAVARTTI JJ

*Superintendent and Remembrancer of Legal Affairs Bengal—Appellant v D E Wilsone — Accused — Respondent*

Full Bench Ref No 1 of 1947 and Govt Appeal No 12 of 1946 Dec ded on 27 5 1947

(a) Calcutta Pol ce Act (4 [IV] of 1866) S 3— Common gaming house — Mean ng of

[Para 27]

(b) Calcutta Pol ce Act (4 [IV] of 1866) S 3— Common gam ng house — Kept or used for the prof t or ga n of the person — Meaning of

The words nstruments kept or used for the profit

the person mpl es that the person runn ng the pre mises hopes to make a profit or ga n by keep ng or using the instruments of gaming it does not mean that there must be proof that such a profit has been made or most inevitably be made The phrase whether by way of charge for the use of such house etc also makes it clear that the profit or ga n might accrue to the person e ther d rectly or ind rectly Hence where the persons owning occupying u ng or keep ng a house room tent walled enclos re space vehicle or place n

place is a common gam ng house w thin the mean ng of the defin t on in S 3 I L R (1937) 1 Cal 610=23 A I R 1936 Cal 783=167 I C 771 *OVERRULED* *Case law reviewed* [Paras 29 33 34]

(c) Calcutta Pol ce Act (4 [IV] of 1866) Ss 46 47 —Warrant issued after strict compl ance with S 46 — *Effect*

In all ca es in wh ch a warrant has been issued after strict compl ance w th the prov s ons of S 46 and cards or other instruments of gam ng have been found on the prem se- the presumpt on may be made under S 47 of the Ac that the cards &c were kept or used for the profit or gain of the person owning or occupying the premises and it w ll then be for the accused to prove that he did not hope for or expect such profit. [Para 36]

*Cases referred* —

1 ('36) 41 C W N 1?3 23 A I R 1936 Cal 783 I L R (1937) 1 Cal 610 167 I C 771 Ranga Lal Sen v Emperor
2 ('2?) 9 A I R 1922 All 61 65 I C 85? Lachchi Ram v Emperor
3 ('24) 46 All 447 11 A I R 1924 All 338 81 I C 439 (F.B) Emperor v Atma Ram
4 ('23) 45 All ?53 10 A I R 19?3 All 19? 76 I C 969 Emperor v Durga Prosad
5 ('18) 16 A L J 760 5 A I R 1918 All 100 47
101
77
18
96
10 ('35) 39 C W N 1111 22 A I R 1935 Cal 466 62 Cal 1093 158 I C 1095 M A Adams v Emperor
11 ('37) I L R (1937) 1 Cal 471 24 A I R 1937 Cal 637 172 I C 146 Phan Bhusan Kumar v Emperor
12 ('37) 24 A I R 1937 Cal 84 169 I C 67 J B

char
15 ('41) 45 C W N 24 28 A I R 1941 Cal 413 I L R (1941) 1 Cal 68 195 I C 7 G tendra Bhu an v Emperor

*K P Khaitan and Bireswar Chatterjee* — for the Crown

*Mons Mukherjee* — for the Accu ed

**Judgment** — This is an appeal under the provis ons of S 417 Crim nal P C An anonymous letter was received by the Calcutta Police as a result of which Sergeant F Watt arranged with the telephone company to tap the line of D E Wilsone of Suit Nos 19 ?3 Central Avenue Calcutta and to l sten into his conversations On 29th December 1945 Sergeant Watt listened in and heard bets being made on the races He made a note of the bets made and submitted a report to the Deputy Commiss oner A warrant to search the premises was issued under the provisions of S 46 Calcutta Pol ce Act by H N Sircar Deputy Commiss oner of Pol ce and the premises were duly searched between 12 30 P M and 1 45 P M on 29th December 1945 by Inspector M A Rahman and Sergeant Watt in the presence of two search witnesses The

with names of horses and amounts of money written in them slips of paper on wh ch were written or typed the names of horses and amounts of money a book maker s betting car No ?63 in the name of M R Agarwal race books and letters and cables from H A Cocks of Bombay referring to bett ng transactions with Wilsone and contain ng a promise to help Wilsone over a book maker s licence

(2) As a result Wilsone was prosecuted for an offence punishable under S 44 Calcutta Police Act Three prosecut on witnesses were examined they proved that Sergeant Watt had l tened into telephone communications and they prove.. the search. The accused pleaded not guilty an.. filed a written statement in whi h he ...

and a small side board. A number of people and some betting slips were found on the premises. Costello J., found that 'M. A. Adams was running this club himself and took the subscriptions of the members, or at any rate he took the profits accruing from the use of the Billiard Table, or from the sale of refreshments, or, money accruing in respect of bar account and so on. 'He also held that it was not a case of Adams making a profit by way of charge for the instruments, nor was there any suggestion that any profit or gain accrued to Adams otherwise than by reason of the fact that he was running this club as one man concern.' The Court found that the betting slips were instruments of gaming and that the accused were rightly convicted. In this case there was no occasion to consider whether profit or gain merely from the gambling would be sufficient to justify a conviction.

[18] In I. L. R. (1937) 1 Cal. 471[11] decided by Nasim Ali J., the accused was an assistant in the office of the Deputy Accountant General Posts and Telegraphs. His desk and his person were searched on a warrant issued under S. 46 and betting slips and money were seized. The conviction under S. 44 was upheld. In this case there could not possibly be any question of a profit by way of charge for the place or instruments, and no suggestion was made that the profit arose otherwise than from the betting.

[19] In I. L. R. (1937) 1 Cal. 610[1] the facts were these: There was a shop at 17 Park Street, Calcutta known as Eastern Drug Stores. Dr. Ranga Lal Sen was allowed by the proprietors of the Drug Stores to use one of the rooms as a consulting room. The police searched that room and found Dr. Ranga Lal Sen actually filling in a betting slip. They found other betting slips in a drawer. In his judgment Henderson J., referred to 53 Cal. 718[9] and observed:

"In that case betting was carried on in the premises and fees were realised by the persons who were in charge of the place,"

and he also referred to the judgment of Costello J., in 39 C. W. N. 1114.[10] He then proceeded,

"we respectfully agree with what is stated there. In our opinion the definition of a common gaming house implies that altogether apart from the money which may be made or lost at the actual gaming, some sort of profit must be made by the person referred to in the definition."

[20] It seems to us that the findings of fact in 53 Cal. 718[9] were not correctly stated by Henderson J., and that there is nothing in Costello J.'s judgment in 39 C. W. N. 1114[10] from which Henderson J.'s conclusion can be drawn. Mitter J., in his judgment observed:

"To satisfy the second element, it is my view that the intended gain must result to the person owning, occupying, using or keeping the place otherwise than as a result of betting by him."

But he did not give his reasons for coming to that conclusion nor base the conclusion on any authority.

[21] The case in A. I. R. 1937 Cal. 84[12] came before Cunliffe and Henderson JJ., Cunliffe J., in his judgment observed:

"The views of the Judges of this Court, as I understand are that such premises are not strictly within the meaning of the language of the Act unless some fixed charge or profit accrues regularly to the person who is occupying or keeping the premises quite apart from any fluctuating profit which may occur from time to time between the gamblers themselves as a result of the gambling."

But later in his judgment the learned Judge observed:

"Whereas I do consider myself more or less bound by considered judicial opinion of the Judges of this Court with regard to the view they have taken as to the definition of a common gaming house contained in the Act, I am by no means sure if I had been sitting on one of those Benches of this Court, which considered the exact legal implication of the language that I should have been able to agree with my brother Judges. I think I should have been inclined to take the wider view of the words 'otherwise howsoever' which is apparently the law on the Bombay Side."

Henderson J., merely observed that he had nothing to add to his judgment in 41 C. W. N. 123.[1]

[22] The next case is I. L. R. (1938) 1 Cal. 672[13] decided by Mukherjee J. Reference is made in the judgment to the decision in 41 C. W. N. 123[1] and the learned Judge certainly did not express any dissent from that decision. But the learned Judge was not impressed with the argument that the finding of betting slips did not show that any profit or again accrued to the appellant otherwise than as a result of the betting by him; and he held that under S. 47 the find of instruments of gaming justified the inference that they were kept or used for profit or gain as contemplated by the section.

[23] In 42 C. W. N. 1232[14] decided by M. C. Ghose J., the head-note reads:

"*Obiter.*—In order to constitute a common gaming house it is sufficient that the house is kept and used for receiving unauthorised bets; it is not further necessary to prove that the accused made any profit beyond the profits of betting."

[24] In 45 C. W. N. 24[15] Edgley J. held that the warrant was illegal and that accordingly no presumption arose from the finding of instruments of gaming, and he held that it must be proved by independent evidence that the accused made a profit. There is nothing in the judgment to show that the learned Judge considered whether it was necessary to prove that profit was actually made or whether it would suffice if it were proved independently that the instruments were kept or used by the accused in the hope of making profit.

[25] It is thus clear that the Bombay High Court has consistently held that it is sufficient to prove that the instruments of gaming were kept or used in the hope that profit or gain would accrue to the owner, and that the profit or gain might accrue merely from the gaming The Allahabad High Court originally took a different view but the latest decision is the same as in Bombay In Calcutta, the only decisions clearly

accrue

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party viz, I L R (1937) 1 Cal 610[1] and A I R 1937 Cal 84[13] The decision of Nasim Ali J in I L R (1937) 1 Cal 471[11] is inconsistent with those decisions and in 42 C W N 1232[14] M C Ghose J expressly dissented from the decision in I L R (1937) 1 Cal 610[1] In A I R 1937 Cal 84[13] Cunliffe J reluctantly agreed with Henderson J in the belief that he was following decisions accepted generally in this Court In I L R (1937) 1 Cal 610[1] Henderson J appears to deduce the result from Costello J's judgment in 39 C W N 1114[10] and from the judgment in 57 Cal 718[9] but there is nothing in those judgments to justify this R C Mitter J gave no reasons and no authority as the grounds for his decision

[26] It is clear, therefore, that there has been divergence of opinion on the subject that the view expressed by Henderson and R C Mitter JJ has not been generally adopted, and that no arguments in support of the view are to be found in any of the judgments except A I R 1922 All 61[3] Such being the case, it is necessary to examine the words of the section and decide what is their ordinary meaning

[27] In the first place, it is to be observed that betting for the purposes of this Act is merely a *form of gaming* and the words of the definition of 'common gaming house' must apply equally to a house where betting is carried on as to a house where other forms of gaming flourish Thus the terms must have the same meaning when applied to a house where betting is carried on, as to a casino where there is gaming on roulette or other games of chance or a house where machines such as fruit machines are kept

[28] Reference to Ss 44 and 45 shews that a distinction is made between the person using the place and persons frequenting the place, and that by the term 'person using such house' in the definition is meant some one such as a licensee or tenant of the building who is running a gaming den and not merely one of the people who frequent it The definition merely requires that instruments of gaming should be kept or used on the premises for the profit or gain of the person who runs the place 'whether by way of charge for the use of such house, room, tent, enclosure, space vehicle place or instruments or otherwise howsoever

[29] The ordinary meaning of the words 'kept or used for the profit or gain of the person' is simply kept or used with the object of making profit or gain for the person There is nothing in the ordinary use of the words to suggest that profit or gain must have been made or even must inevitably be made It is obvious that in all games of chance there must be a chance of gain and a chance of loss otherwise people would not gamble In the case of roulette, the punter must occasionally win otherwise he would not punt But the roulette wheel is so constructed that in the long run the Bank will win Similarly, with a fruit machine, the gambler must occasionally win otherwise he would not gamble But the machine is so constructed that over a period, the gamblers are almost certainly bound to lose In gambling with a book maker experience shows that the position is similar The book maker who accepts bets on every horse in a race cannot expect all of them to lose and must therefore expect to lose on some of the bets, yet expects to make a profit as a result of the sum total of the betting and, in general, is able to make his book so that he does so It seems to us impossible to read into the words of the definition a requirement that a profit has actually been made or that it must inevitably be made It would ordinarily be quite impossible to adduce evidence to prove that profit had actually been made, and there seems to be no reason for assuming that the Legislature meant to impose an impossible condition Nor could it even be said in connection with most forms of gambling that a profit must inevitably be made within a limited period The most that can be said is that the prospects of profit to the Bank in the case of roulette, and to the owner of a fruit machine are extremely rosy In our opinion, the phrase kept or used for the profit or gain of the person' simply implies that the person running the premises hopes to make a profit or gain by keeping or using the instruments of gaming, it does not mean that there must be proof that such a profit has been made or most inevitably be made.

[30] The next [illegible] the meaning of the phrase "whether by way of charge [illegible] otherwise howsoever" Now [illegible]

so. It would be passing strange if the Legislature were to approve of a casino to which everybody including the very poorest could enter freely and gamble at roulette or on fruit machines, and were to disapprove of a similar place from which the poorer classes were kept away by the imposition of an entrance fee.

[31] It seems to us clear that the Legislature, without interfering with ordinary gambling among friends, sought to prevent (otherwise than at the places and times mentioned in the exception in the definition of gambling) people making a business of gambling, and attracting others with the hope of making a profit out of them.

[32] The definition of 'common gaming house' would be quite intelligible if the phrase 'whether by way of charge. . . . or otherwise howsoever' were deleted. In that case, a question might arise whether the profit or gain accruing indirectly from the use of the instruments of gaming was covered; but it would not be possible to argue that profit arising directly from the use of those instruments would be insufficient.

[33] The phrase "whether by way of charge etc." is obviously explanatory, and it seems unreasonable to hold that an explanation should be added to a definition, which is entirely inconsistent with the definition. Moreover, if it was intended that by adding such an explanation the application of the definition should be restricted, it is strange that words of such wide import as 'or otherwise howsoever' should be used. The only reasonable interpretation of the addition of this phrase to the definition is that the Legislature wished not to restrict the meaning of the words used but to give them their widest meaning, and to make it clear that the profit or gain might accrue to the person either directly or indirectly.

[34] We are definitely of the opinion that it is sufficient if the person referred to in the definition expects to make a profit or gain from the actual gambling. We therefore answer the first question submitted by the Division Bench in the affirmative and the second question in the negative.

[35] At the same time, we respectfully agree with the learned Judge who decided A. I. R. 1922 ALL. 61[2] that the words "instruments kept or used for the profit or gain of the person. . . . ." are not simply equivalent to "instruments. . . . kept or used for the purpose of gaming," though we are unable to agree with the conclusions they deduced. The position of the person, (i.e., the owner, occupier, user or keeper of the place) must be such that his prospects of profit or gain are not merely the same as those of the persons who visit the establishment.

[36] But, in all cases, in which a warrant has been issued after strict compliance with the provisions of S. 46, Calcutta Police Act, and 'cards . . . .or other instruments of gaming' have been found on the premises, the presumption may be made under S. 47 of the Act, that the cards etc., were kept or used for the porfit or gain of the person owning or occupying the premises, within the meaning of the section, and it will then be for the accused to prove that he did not hope for or expect such profits.

[37] Turning now to the facts of the present case, we are satisfied that instruments of gaming were found on the premises and that the respondent was the occupier of those premises. As the accused was unable to rebut the presumption arising under S. 46 of the Act, we are further satisfied that the instruments of gaming were kept or used for the profit or gain of the respondent. In this view, the respondent ought to have been convicted.

[38] We therefore order that the appeal be allowed, the acquittal be set aside and that the respondent be convicted and sentenced under S. 44, Calcutta Police Act to pay a fine of Rs. 500 and in default to undergo rigorous imprisonment for three months. Let the typewriter be returned to the accused and the other instruments of gaming be destroyed.

N.S.D. *Appeal allowed.*

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## A. I. R. (34) 1947 Calcutta 434 *[C. N. 135.]*

DAS J.

*Jitendra Nath Mondal — Plaintiff — Appellant* v. *Nandalal Dass — Defendant and others — Respondents.*

Appeal No. 27 of 1943, Decided on 1-5-1947, from appellate decree of Sub-Judge, Asansol, D/- 18-6-1942.

**(a) Civil P. C. (1908), O. 8, R. 3—Ejectment suit —Denial of plaintiff's title by defendant in written statement.**

The plaintiff filed a suit for declaration of his exclusive title and for recovery of khas possession alleging that he had purchased the land from one *K* and was dispossessed by defendant. The defendant traversed the title and possession of plaintiff and *K*. The Court observed that from the pleadings it was an admitted case that the property belonged to *K*.

*Held*, that the observation was not correct; that the plaintiff suing in an ejectment suit could only succeed on the strength of his own title and there was no obligation on the defendant to plead possible defects in that title; it was sufficient that in the written statement the plaintiff's title was denied : 33 A. I. R. 1946 P. C. 59, *Rel. on.* [Para 10]

('44-Com.) Civil P. C., O. 8 R. 3, Note 1 Pt. 3.

**(b) Limitation Act (1908), Art. 144 — Suit for ejectment against trespasser — Sufficiency of proof of plaintiff's mere prior possession.**

In a suit for declaration of plaintiff's exclusive title and for recovery of khas possession of the whole land on an allegation of dispossession, it is not sufficient for

the plaintiff in order to mainta n the suit aga nst the defendant who s a mere trespasser to say that as the pla nt ff was in possess on of the whole land for a long t me he is entitled to a decree for possess on even though his title extends to a portion only The plain t ff can only succeed on the strength of h s t tle 18 A I R 1931 Cal 483 and 2 I C 202 (Cal) *Expl* 16 A I R 1929 Cal 28 and 22 A I R 1935 Cal 646 *Ref* [Para 12]

(42 Com) Lim Act Art 144 Note 4 Pt 14

(c) Civil P C (1908) O 21 R 103 — Nature of suit under

Although in the summary proceedings under O 21 Rr 98 99 and 101 the inqu ry is d rected to quest on of possession the scope of the su t under R 103 is much wider It is a su t based on the right to pos es s on and not on mere possess on at the relevant date The plaint ff cannot succeed by merely showing that he was in po sess on and had been disposses ed but must establish h s right to possess on on the assumption that he was not in possess on on the date of order under Rr 98 99 or 101 19 A I R 1932 All 703 8 A I R 1921 Mad 317 and 25 A I R 1938 Pat 433 *Rel on* [Para 13]

(44 Com) Civil P C O 21 R 103 Note 1 Pt 10

*Cases referred* —

1 (46) 50 C W N 477 81 C L J 107 33 A I R 1946 P C 59 I L R (1946) Kar P C 24 223 I C 394 (P C) Jagad sh Nara n v Said Ahmed Khan
2 (10) 14 C W N 141 2 I C 202 Banku Behari v Raj Chandra
3 (31) 58 Cal 29 18 A I R 1931 Cal 483 132 I C 906 Satish Chandra v Madan Mohan
4 (34) 38 C W N 435 21 A I R 1934 Cal 561 61 Cal 419 150 I C 723 Kiron Chandra v Prasonna Kumar
5 (29) 49 C L J 83 16 A I R 1929 Cal 28 115 I C 180 Naresh Chandra v Hyder She kh
6 (36) 40 C W N 81 22 A I R 1935 Cal 646 158 I C 445 Joygopal Sinha v Probodh Chandra
7 (89) 16 I A 186 12 All 51 5 Sar 448 (P C) Mt Sundar v Parbati
8 (21) 44 Mad 227 8 A I R 1921 Mad 317 60 I C 109 Unni Moid n v Pecker
9 (38) 17 Pat 164 25 A I R 1938 Pat 433 177 I C 806 Abdul Hak m v Mangal Chand
10 (32) 19 A I R 1932 All 703 139 I C 366 Mural dhar v Jainti Prasad

*Bankim Ch Mukherjee and Muktipada Chatterjee* — for Appellant
*Jagdish Ch Ghose* — for Respondents

**Judgment** —This is an appeal by the plain tiff against the judgment and decree of the Subordinate Judge Asansol District Burdwan

[2] Briefly stated the plaintiff s case is that the disputed property belonged to Kamaruddin Molla who sold the same to plaintiff s father on 6-3 1933 On 17 11 1938 defendant 1 purchased the disputed property in T Execution Case No 103 of 1938 against the heirs of Kamaruddin The plaintiff having being dispossessed on 8-1 1939 by defendant 1 at the time of taking possession in the said execution case the plaintiff filed an application under O 21 R 100, Civil P C which was dismissed on 13-5 1939 The plaintiff accordingly filed the suit for declaration of the plaintiff s mishkar right in the suit land and for khas possession on demolition of the huts erected by defendant and for permanent injunction

[3] The suit was contested by defendant 1 mainly on the ground that the plaintiff s kobala was a benami transaction that the plaintiff or his father had no possession that the Province of Bengal who had got the disputed land sold for non payment of court fees and at which defendant 1 purchased was a necessary party

[4] The trial Court held that the property belonged to Enayet Ali father of Komoraddi that the plaintiff s father s purchase from Kamaruddin was not a benami one and this purchase being prior to that of defendant 1 the latter did not acquire any title by his auction purchase of the interest of Kamaruddin s heirs the judgment debtor having no saleable interest at the time that the plaintiff and his father were in exclusive possession, the other heirs of Enayetulla did not claim any title or possession that the plaintiff was dispossessed on 8-1 1939 that defendant 1 was estopped from challenging the exclusive title and possession to the plaintiff In the result the plaintiff s suit was decreed in full

[5] Defendant 1 preferred an appeal

[6] The lower appellate Court found that the disputed property belonged to Enayetulla and on Enayetulla s death devolved on his son Kamaruddin his widow Nabijan and his daughter Shajadi that the shares of Nabijan and Shajadi were not lost by adverse possession the posses sion of Kamaruddin was possession on behalf of Nabijan and Shajadi Kamaruddin s share which was 7/12th had passed to the plaintiff s father by his purchase in 1933 which was not a benami one that as the plaintiff was suing for khas possession he can succeed only on the strength of his title

was declared and the plaintiff was directed to get joint possession with the defendant [illegible] of the prayers were disallowed Plaintiff was awarded 7/12th share of the costs [illegible] defendant 1 was allowed 5/12th [illegible] peal of which was to be set up [illegible]

[7] The plaintiff has appea [illegible]

[8] Mr Bankim Chandra [illegible] ing on behalf of the app [illegible] lower appellate Cour[illegible] title being with En[illegible] that as the plain [illegible] session o[illegible] long time th [illegible] the who[illegible] 7/12th [illegible] H [illegible]

under O. 21, R. 103, Civil P. C., he can succeed on proof of his possession at the date of alleged dispossession as the dispossessor was a mere trespasser, the plaintiff having some title.

[9] I shall deal *seriatim* with these contentions.

[10] As regards the first contention, Mr. Mukherji refers to a passage in the judgment of the trial Court to the following effect:

"from the pleadings of the parties it is almost an admitted case that the disputed property did belong to Kamaruddin Molla."

I do not think, the Munsif was right in his observation. Defendant 1 traversed the title and possession of the plaintiff and of Kamaruddin. An issue was joined on the following terms "Has the plaintiff any right, title or interest in the disputed properties?" In 50 C. W. N 477=81 C. L. J. 107[1] their Lordships of the Judicial Committee held that a plaintiff suing in ejectment can only succeed on the strength of his own title. There is no obligation on the defendant to plead possible defects in that title. It is sufficient that in the written statement the plaintiff's title is denied. This contention therefore fails.

[11] The second contention, in my opinion, is also not sustainable. It is opposed to the settled view of our Court. Mr. Mukherji has relied on the decisions in 14 C. W. N. 141,[2] 58 Cal. 29,[3] 38 C. W. N. 435=61 Cal. 419[4] and has argued that as his vendor Kamaruddin obtained exclusive possession of the whole and as the plaintiff's father and then the plaintiff were in such possession, though short of the statutory period of 12 years, nevertheless he can successfully maintain an ejectment against defendant 1 who is a mere trespasser.

[12] In the present case, the plaintiff prayed for declaration of his exclusive title and for recovery of khas possession on an allegation of dispossession and for demolition of the structures erected by defendant 1 after he took possession. In my opinion, the plaintiff in the suit as framed, can succeed only on the strength of his title and not on the weakness of the defence. I shall now deal with the above cases.

[13] In 14 C. W. N. 141,[2] the plaintiffs had failed to prove the mokarari title set up by them, but had proved their tenancy right by possession on payment of rent. This was held to be sufficient to maintain a suit for recovery of possession against the defendants who were trespassers. It is apparent that the title proved by the plaintiffs was exclusive and entitled them to possess the whole of the land. The general observation made at page 143 must be read in the light of the facts of the case. In 58 Cal. 29,[3] which was decided by Page J. sitting singly, His Lordship held that the right of the plaintiff to eject the defendants did not rest merely on bare and unexplained prior possession but that the possession of the plaintiff was by virtue of a title derived from the maliks of the lands which gave them a right for possession. His Lordship expressly held that it was not necessary for him to consider whether a cosharer can eject trespasser from the entirety of the premises. The wide statement of the law in the early part of the judgment was obiter. The case in 61 Cal. 419[4] does not really assist the appellant. After referring to the decisions of the different High Courts their Lordships (Malik and Jack JJ.) observed :

"So far as this High Court is concerned, it is well settled by decisions which are binding upon us that mere previous possession will not entitle a plaintiff to a decree for recovery of possession except in a suit under S. 9, Specific Relief Act."

Referring to the decisions in 14 C. W. N. 141,[2] 58 Cal. 29[3] which have been relied on by Mr. Mukerji, their Lordships observed that in all these cases previous peaceful possession for a long time gave rise to an inference of title in the plaintiff as against a trespasser and entitled him to a decree for possession against a trespasser who had no right whatsoever to possession. In the present case, the finding of the Court of appeal below is that the possession of Komoruddi was not exclusive but was on behalf of himself and his cosharers viz., his mother and sister. The view taken in the case last cited has been applied to the case of a cosharer seeking recovery of possession of the whole of the property, in 49 C. L. J. 83,[5] a decision of D. N. Mitter J. sitting singly which was affirmed in Letters Patent Appeal No. 104 of 1928. The view taken by Mitter J. was re-affirmed in 40 C. W. N. 81[6] which was also a case of cosharer seeking to recover possession of the whole. At page 83, Nasim Ali J. observed as follows :

"In the second place, 16 I. A. 186[7] is not an authority for the proposition that where a person brings a suit for ejecting a trespasser and is not defending his possession, he can eject the trespasser from the whole of the land. If a person has entered into possession lawfully and peaceably and if his possession is attempted to be disturbed by a person who has no title, he can maintain his possession by an injunction from the Court. If, however, he is dispossessed and does not sue for possession under S. 9, Specific Relief Act, he can only succeed on the strength of his own title."

Henderson J. who concurred in the decision went on to state that :

"In the second place, the previous possession of the plaintiffs was merely that of cosharer and it is quite ingless to say that they were in possession of a share meangreater than that to which they were entitled."

The second contention therefore fails. As regards the third contention, I have pointed out that the suit is not strictly in terms of O. 21, R. 103, Civil P. C. But assuming that it is so, I

think the plain words of the rule negative th s contention A suit under the Rule is expressed to be a suit to establish the right which he (plaintiff) claims to the present possession of the property. It is a suit based on the right to possession and not on mere possession at the relevant date It is true that in the summary proceedings under O 21 Rr 98 99 101 Civil P C the inquiry is directed to question of possession but the scope of the suit under Rule 103 is much wider This view is fully supported by the decisions in 44 Mad 227[8] and 17 Pat 161[9] It has been held in A I R 1932 ALL 703[10] that a suit under O 21 R 103 Civil P C is not akin to a suit under S. 9 Specific Relief Act and the plaintiffs in a suit under O 21 R 103 Civil P C cannot succeed by merely showing that they were in possession and had been dispossessed they must establish their right to possession on the assumption that they were not in possession on the date of the order under Rules 98 99 101 This contention also fails

[14] In the above view it is not necessary to deal with the contention raised by Mr Jagadish Chandra Ghose appearing for the respondent that the Province of Bengal who was in substance the decree holder at whose instance the sale at which defendant 1 purchased was held, was a necessary party to the suit under O 21 R 103 Civil P C The appeal accordingly fails and must be dismissed with costs

D H *Appeal dismissed*

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## A I R (34) 1947 Calcutta 437 [*C N. 136*]

CHAKRAVARTTI AND ELLIS JJ

*Rohini Kumar Roy and others — Judgment debtors — Appellants* v *Uday Chand Mahatab — Decree holder — Respondent*

Appeal No 46 and Civil Rule No 409 (M) of 1946 Decided on 30 4 1947 from original order of Sub Judge Second Court Hooghly D/ 27 11 1945

Bengal Tenancy Act (8 (VIII) of 1885) S 168A —*Applicability of to decree directing execution of patni lease and decreeing arrears of rent on basis of lease*

character of rent and then execute the decree against other properties of the judgment debtor on the basis that it is not for rent There is no reason why S 168A cannot be said to apply to such a decree and why it cannot be said to be a decree in respect of a tenure or holding [Para 6]

*S C Janah* — for Appellants

*Purushottam Chatterji* — for Respondent

**Chakravartti J.**—This appeal is on behalf of the judgment debtors and is directed against an order dated 27 11 1945 passed by the learned

[2] The material facts are the following On 9 6 1942 the respondent brought a suit being Title Suit No 2 of 1943 in the Court of the Second Subordinate Judge of Hooghly asking for specific performance of a contract as also the recovery of a sum of Rs 1829 12 10 The case upon which these claims were made was of a somewhat complicated character Shortly stated the plaintiff s case was that a certain patni namely lot Santoshpur was sold for the arrears of the Bengalee year 1342 and purchased by the appellants The defaulting patnidar brought a suit for having that sale set aside but during the pendency of that suit the patni was sold again and purchased by a third party named Bata Krishna Mandal This Bata Krishna Mandal was added as a party to the *suit already brought by the old defaulting* patnidar and ultimately by the decree passed in that suit both the second and the third patni sales were set aside Then there was a fourth sale for default in respect of the Bengalee year 1345 and this time the patni was purchased by the respondent himself who was the superior proprietor It was alleged in the plaint that after the respondent s purchase of the patni the appellants approached him for a re-settlement with them and on 4 11 1939 an order agreeing to such re settlement was made The plaint proceeded to state that on the basis of that re settlement the appellants went into possession of the patni and were recorded as patnidars in the papers of the respondent that they made certain payments as patnidars but that a large amount of the rent had fallen into arrears and the appellants had also not executed an indenture of lease as stipulated On these allegations the plaintiff asked that a decree might be passed in his favour for specific performance of the contract for patni settlement and also a money decree on either of two alternative grounds If it was held that the appellants were liable to perform specifically the contract for settlement of the patni a decree might be passed against them for rent but if the Court held that the plaintiff was not entitled to specific performance then a decree might be passed for a certain amount as damages

[3] On that plaint an ex parte decree was passed on 28 1 1944 The prayer for specific performance was allowed and it was stated the the plaintiff will get the arr

The heading of the decree d

one for specific performance of contract and recovery of arrears of rent and cesses with interest.

[4] It was this decree which is being sought to be executed and so far as the money portion is concerned, execution is being sought to be levied against properties other than the tenure in question. The objection of the appellants which the learned Subordinate Judge has turned down was the obvious one under S. 168A, Ben. Ten. Act, namely, that the decree being one for arrears of rent, could not be executed by the attachment or sale of any property of the judgment-debtors other than the tenure to which the decree related. The learned Judge held this contention to be untenable on the ground that since the specific performance decreed by the Court had not yet taken place and since no registered indenture of lease had been executed, there was no tenure yet and accordingly no objection under S. 168A which presupposed existence of a tenure could possibly be maintained.

[5] It was contended on behalf of the appellants that in taking the view which he did, the learned Judge really went behind the decree. The decree, it was said, was a decree for rent and the executing Court was not at liberty to treat it as any other kind of decree. On behalf of the respondent, it was contended that the view taken by the learned Judge below was right, since an objection under S. 168A could only be taken by a tenant when there was or had been a tenancy but not where the tenancy had yet to come into existence. In aid of this argument, it was contended that no patni tenure could come into existence in law until a registered indenture had been executed.

[6] It appears to us that the contention between the parties can be disposed of on a short ground. It may be, as the learned Judge has observed, that no tenure has come into existence yet; but at the same time it cannot be overlooked that the decree which is being sought to be executed is a decree which gave effect to one of the prayers of the plaintiff and did not give effect to the other. The decree was not passed for any sum of money on account of damages; it was passed for an amount as rent and it was linked up with the decree for specific performance. The learned advocate for the respondent was, in our view, right in saying that a decree for rent in the circumstances of the present case could be explained only on the basis that on the specific performance of the contract as ordered, the decree for money would become a decree for rent. But an answer to the claim of his client to execute the decree against other properties of the appellants can be found in that very circumstance. If the decree be a composite decree, directing the execution of an indenture of patni lease and making a decree for a sum of money as rent on the basis that the lease will be executed, the decree-holder cannot, in our view, separate the two so as to remove from the amount decreed its character of rent and then execute the decree against other properties of the judgment-debtor on the basis that it is not rent. The learned advocate for the respondent contended that in order that S. 168A might apply, there must be a tenure or holding in existence. The matter is not altogether clear but taking the decree actually passed in the present case as it is, we find no reason why the section which speaks of "the decree for arrears of rent due in respect of a tenure or holding" cannot be said to apply in the present case and why the decree that is being sought to be executed cannot be said to be a decree in respect of a tenure or holding. Be that as it may, all that we are concerned to decide in the present appeal is whether the respondent is entitled to execute the money portion of the decree against properties of the appellants other than the tenure concerned. In our opinion, he is not. He must accept the decree as it is and accept the position that the amount awarded to him by it is rent. If the decree as a decree for rent is up till now a decree of only a conditional character and will become a real decree for rent only after the indenture of lease has been executed, he must wait for executing the money portion of the decree till he succeeds in obtaining a lease. Whether other defences will then be available to the appellants it is not necessary for us to say, nor it is necessary to make any reference to certain subsequent developments which were brought to our notice.

[7] In our opinion, the respondent is not entitled to break up the integrity of the decree and treat the money portion as a simple decree for money, thus enabling himself to proceed in execution against any properties of the judgment-debtors. In so far as his present execution case relates to the realisation of this sum out of other properties of the judgment-debtor, the objection under S. 168A must prevail and the execution case to that extent, must be dismissed.

[8] For the reasons given above, the appeal is allowed, the judgment and order of the learned Judge dated 27-11-1945 are set aside and it is ordered that the respondent's execution case in so far as it relates to the realisation of the decretal money out of other properties of the appellants, be dismissed. The appellants are entitled to their costs from the respondent. The hearing fee is assessed at three gold mohurs.

[9] No orders are necessary on the application and the connected rule

**Ellis J**—I agree

V R *Appeal allowed.*

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## A. I R (34) 1947 Calcutta 439 [C N. 137 ]

SEN J

*Satkari Ghose—Complainant — Petitioner* v *Ram Lakshman Dutta — Accused—Opposite Party*

Criminal Revn No 245 of 1947, Decided on 30 4 1947

Criminal P C (1898) Ss 202, 203 and 195 (1) (b) — Report by police that complaint of theft was false — *Notice by Magistrate to complainant to show cause why he should not be prosecuted* under S 211, Penal Code—'Naraji petition filed by complainant in answer to notice—Procedure

A complaint was made to police of a theft The police found that the case was false and reported to the Magistrate for taking action under S 211 Penal Code The Magistrate issued notice to the complainant to show cause why he should not be prosecuted under S 211, Penal Code As regards the 'naraji petition the Magistrate made the following observation 'This also disposes of the naraji petit on'

*Held*, that 'naraji' petit on was a compla nt within

*Held also* that as there had been a complaint in

... the ome ate a 4}

(46 Com) Cr P C, S 4 (1) (b) N 9, Pt 32, S 200, N 5 Pt 1.

*Case referred* —

1 (16) 43 Cal 1152 4 A I R 1917 Cal 593 36 I C 845 Tayebullah v Emperor

*Bireswar Chatterjee and Parimal Mukherji* — for Petitioner

*Serajuddin Ahmed* — for the Crown

**Order.**—After hearing the learned Advocate for the petitioner and the learned Advocate for the Crown I am of opinion that this rule must be made absolute The facts briefly are as follows On 15 9 1946, the petitioner lodged an information at the Memari Police Station in the District of ... man Dutt ... house It is ... taken away by Ram Lakshman Dutt at about 12 30 A M The police investigated the case and made a final report stating that the case was false and praying that the petitioner may be prosecuted for lodging a false case and thereby committing an offence punishable under S 211, Penal Code Upon this the petitioner filed what is known as a 'naraji petition impugning the correctness of the police report and stating that his case was true The learned Magistrate had previous to this issued a notice on the petitioner to show cause why he should not be prosecuted for having committed an offence punishable under S 211 Penal Code and it was in answer to this notice that the petitioner filed his "naraji' petition The Magistrate thereafter examined five witnesses produced by the petitioner and on 6 12 1946 he passed orders In his order he says that he is of opinion that the information given by the petitioner is 'improbable and false' and that a *prima facie* case for a prosecution for an offence punishable under S 211, Penal Code, had been made out against the petitioner, thereupon he decided to try the petitioner for this offence and summoned the petitioner As regards the 'naraji petition the learned Magistrate makes the following observation 'This also disposes of the 'naraji petition" Against this order, the petitioner moved the Sessions Judge who rejected the motion and passed an order which discloses that the learned Judge had taken no trouble whatsoever to investigate the law and the different sections of the Code of Criminal Procedure which have been violated I would point out to the learned Sessions Judge that in criminal matters he should be careful to see that there has been a strict compliance with the law, criminal cases should not be disposed of in the rough and ready manner which the learned Judge seems to have adopted

[2] It has been well established by a long series of decisions that a naraji' petition is a complaint within the meaning of S 4 (b), Criminal P C Thus there was before the learned Magistrate a petition of complaint by the petitioner charging Ram Lakshman Dutt with theft That petition of complaint had to be disposed of in accordance with the provisions of the Code of Criminal Procedure The learned Magistrate could have issued summons on the petition of complaint against Ram Lakshman Dutt and proceeded to try him If he had any suspicion regarding the truth of the complaint and he considered that there should be a postponement of the issue of process against the person complained against the learned Magistrate could have adopted one or other methods prescribed in S 202, Criminal P. C Apparently the learned Magistrate wished to proceed under S 202, Criminal P C inasmuch as he examined witnesses produced by the complainant before deciding whether or not

but he did not comply fully with the provisions of that section which says that he should record his reasons for postponing the issue of process. This however is not the only error committed by the learned Magistrate. There are other and more serious errors.

[3] After examining the witnesses for the complainant there were two courses open to the learned Magistrate. He could have either summoned Ram Lakshman Dutt and tried him or he could have dismissed the complaint under S. 203, Criminal P. C., if he was of opinion that there were not sufficient grounds for proceeding with the case. In the latter case he should briefly record his reasons for dismissing the complaint. The learned Magistrate has not even dismissed the complaint. All he has said is this: "This also disposes of the naraji petition." The learned Magistrate would have done well to have studied the Code of Criminal Procedure and proceeded in accordance therewith instead of inventing a procedure of his own. If the learned Magistrate had dealt properly with the matter and if he had dismissed the petitioner's complaint the petitioner would have had a remedy. He could have moved against the order of dismissal. He has been deprived of that remedy by an order which does not dismiss the complaint.

[4] The next difficulty in the way of the Crown is this. As the matter was before the Court upon a complaint the provisions of S. 195 (1) (b), Criminal P. C. would at once be attracted. Section 195 (1) (b), Criminal P. C. says, inter alia, that no Court shall take cognizance of any offence punishable under S. 211, Penal Code when such offence is alleged to have been committed in or in relation to any proceeding in any Court except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. If the case of the petitioner was false, he would be guilty of an offence punishable under S. 211, Penal Code, but the offence would be one which had been committed in a proceeding in Court because the offence was committed when the false complaint was lodged in Court. Had there been no naraji petition or complaint, then S. 195 (1) (b), Criminal P. C. would have had no operation. The Court could have taken cognizance of the case against the petitioner in accordance with the provisions of S. 190 (1) (b), Criminal P. C. But once there has been a petition of complaint in Court, S. 195 (1) (b), Criminal P. C. comes into operation and there must be a complaint in writing by the Court in which the complaint was lodged or by some other Court to which such Court was subordinate. In this connection I would refer to the case in 43 Cal. 1152.[1] This is not a mere technical error. If the learned Magistrate had made a complaint in writing in accordance with the provisions of S. 195 (1) (b), Criminal P. C. as he was bound to do, the petitioner would have had a remedy by way of appeal under S. 476B, Criminal P. C. In the present case this right of appeal has been denied the petitioner by reason of the procedure adopted by the learned Magistrate.

[5] Having regard to all these circumstances I set aside the order passed by the learned Magistrate and direct him to deal with the naraji petition as if it were a petition of complaint and to proceed in accordance with the provisions of S. 200, Criminal P. C. and the following sections. After he has disposed of the complaint in accordance with the provisions of law, the learned Magistrate may take such steps as he thinks proper in accordance with the provisions of the Code of Criminal Procedure adverted to above and in the light of the observations made above.

D.S. *Rule made absolute.*

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**A. I. R. (34) 1947 Calcutta 440** *[C. N. 138.]*

HARRIES C. J.

*Rajendra Nath Manna and others—Petitioners* v. *Jogjiban Hansda and others — Opposite Party.*

Civil Rule No. 1170 of 1946, Decided on 17-4-1947 from order of Dist. Judge, Midnapur, D/- 10-4-1946.

Bengal Agricultural Debtors Act (7 [VII] of 1936), (as amended by Act of 1942), S. 37A (1) (c) (iii) — Lease for valuable consideration — Meaning of — Rent payable annually under lease — T. P. Act (1882), S. 105.

In India there can be a lease where no rent is payable and it may be that such a lease would be a lease not for valuable consideration. Where, however, a rent is payable annually under a lease the agreement to pay rent is clearly a valuable consideration and hence in such a case it would not be correct to say that merely because no selami was paid the lease was without valuable consideration. [Paras 4, 5]

('45-Com.) T. P. Act, S. 105, Note 57.
*Saroj Kumar Maity*—for Petitioners.
*Bireswar Chatterjee*—for Opposite Party.

**Order.** — The only question in this case is whether a lease under which a rent was payable annually is a lease for valuable consideration. The point arises under S. 37A (1) (c) (iii), Bengal Agricultural Debtors (Amendment) Act of 1942.

[2] It is common ground that there was a lease in this case and the Courts have held that it was a *bona fide* one. Learned advocate for the opposite party has attempted to challenge that finding, but it appears to me that at this stage in revision I cannot possibly go into a question which is purely one of fact.

[3] Learned advocate for the opposite party also urged that the view of the Courts below

t a lease where no *selami* was paid is a lease thout valuable consideration is the correct e According to the Courts below, the rent ayable every year could not be regarded as onsideration for the lease

[4] In this country a lease can exist where no rent is payable and it may be that such a lease would be a lease not for valuable consi deration On the other hand, where a rent is payable under a lease it appears to me that the rent is consideration from the promisee to the landlord, the promisor The contract is that the landlord would give the tenant the property for a certain period of time in return for a promise to pay a yearly rent It appears to me that the agreement as to payment of rent is clearly con sideration as that word is defined in S 2 (d), Contract Act

[5] In my judgment the Courts below were wrong in holding that as no *selami* was paid there could be no consideration This lease was a lease for consideration and therefore the orders of the Courts below must be set aside and the order of the Board restored The rule is there fore made absolute with costs Let the counter affidavit filed in Court today be kept on the record

*Rule made absolute*

N S D

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## A I. R. (34) 1947 Calcutta 441 [*C N. 139* ]

BLANK AND CHAKRAVARTTI JJ

*Sm Rajabala—Defendant — Appellant* v *Sm Sukumari Debi w/o Gurupada Haldar, Plaintiff and another—Respondents*

Appeal No 1026 of 1942 Decided on 13th January 1947, from appellate decree of Sub-Judge, Second Addi tional Court, Alipur, 24 Parganas D/ 2nd April 1942

(a) Bengal Non Agricultural Tenancy (Tem- porary Provisions) Act (9 [IX] of 1940) S 3 — Scope — Suit to eject tenant on ground of non- payment of rent — Meaning — T P Act, Ss 111 and 114

The words suit or proceedings for ejectment on account of the non payment of rent ' in S 3 refer only to cases where there was a condition in the lease that on default of payment of rent for a specified period the tenancy would be forfeited and the landlord would have a right to enter and a suit is brought by the landlord to eject the tenant on the ground that default has been committed with respect to payment of rent The mere fact that the tenant was in arrear in respect of rent is not sufficient Every suit for ejectment in which there is a claim for rent is not a suit for ejectment on account of non payment of rent within S 3 28 A I R 1941 Cal 302 *Dissent* , 29 A I.R 1942 Cal 550 *Rel on*, 46 C W N 1025 Expl [Paras 4 5 6]

(b) Bengal Non-Agricultural Tenancy (Tem- [porar]y Provisions) Act (9 [IX] of 1940) S 3 — Suit [...] Claim to recover arrears of rent [...]

Section 3 has no reference to a claim for rent and damages for use and occupation and where the prayers in a suit comprise both ejectment and recovery of arrears of rent with damages for use and occupat on the proceed ings so far as they relate to the latter claim, are not liable to be stayed [Para 8]

(c) Bengal Non Agricultural Tenancy (Tem- porary Provisions) Act (9 of [IX] of 1940), S 3 — Main enactment and proviso — Applicability — Suit for ejectment within main provision — Decree for ejectment—Validity

The main provision of S 3 applies only to suits in which the claim for ejectment is grounded in some rea son other than non payment of rent and gives relief against trial of such suits The proviso applies only to suits of the excepted kind and with respect to them, relief is given not against the trial of the suits which cannot be stayed but only against the execution of the decrees Where a suit for ejectment was one within the main provis on of S 3 a decree for ejectment would be without jurisdiction and must be set as de It cannot be maintained with the qualification that its execution would be liable to be stayed under the proviso 51 C W N 131 and S A No 1164 of 1942 *Dissent* [Paras 12 13]

*Cases referred* —

1 ( 41) 45 C W N 22 28 A I R 1941 Cal 802 194 I C 581 Purnendu Nath v Narendra Nath
2 ( 41) 45 C W N 991 29 A I R 1942 Cal 145 I L R (1942) 1 Cal 49 200 I C 453 Kumud Nath Das v Protap Chandra Muzumdar
3 ( 42) 46 C W N 889 29 A I R 1942 Cal 550 203 I C 184 Reliance Jute Mills Co Ltd v Dukhi Shah Dhanraj Shah
4 ( 42) 46 C W N 1025 Radhikalal Goswami v Gope swar Basu
5 ( 46) 51 C W N 131 Gangjee Sajun & Co v Lalji Agarwala Jain
6 Appeal No 1164 of 1942 D/ 11th July 1946 Surendra Nath Das v Sm Sukumari Debi

*Pramatha Nath Mitter for Radhabinod Pal Mani* [...] *dra Nath Ghose and Hemanta Krishna Mitra* — for Appella[nt]

*Subodh Chandra Basak* — for Respondents

**Chakravartti J.**—This appeal is on beh[alf] of the defendant, and it arises out of a suit [for] ejectment, after service of notice to quit [in] which a claim for arrears of rent as also [for] damages on account of subsequent use and [occu]pation was joined The plaintiff s allegation [was] that the defendant was occupying the lan[d as a] monthly tenant and had failed to vacate [it] after the expiry of the period given to [her by] the notice to quit

[2] The trial Court decreed the suit in [respect] of both the claims and made an order f[or reco]very of possession as also for rent as cl[aimed] the suit, together with damages up to [the date] of the judgment, provided that the def[...] fees were paid by the plaintiff within [...] An appeal taken by the defendant to [...] appellate Court was dismissed

[3] Only one point was urged befor[e us in the] present second appeal, and it will b[e ...] to state the tenant s defence so far a[s ...] is concerned The suit was brought [...] 1940, and it was on the very next d[ay ...]

but he did not comply fully with the provisions of that section which says that he should record his reasons for postponing the issue of process. This however is not the only error committed by the learned Magistrate. There are other and more serious errors.

[3] After examining the witnesses for the complainant there were two courses open to the learned Magistrate. He could have either summoned Ram Lakshman Dutt and tried him or he could have dismissed the complaint under S. 203, Criminal P. C., if he was of opinion that there were not sufficient grounds for proceeding with the case. In the latter case he should briefly record his reasons for dismissing the complaint. The learned Magistrate has not even dismissed the complaint. All he has said is this: "This also disposes of the naraji petition." The learned Magistrate would have done well to have studied the Code of Criminal Procedure and proceeded in accordance therewith instead of inventing a procedure of his own. If the learned Magistrate had dealt properly with the matter and if he had dismissed the petitioner's complaint the petitioner would have had a remedy. He could have moved against the order of dismissal. He has been deprived of that remedy by an order which does not dismiss the complaint.

[4] The next difficulty in the way of the Crown is this. As the matter was before the Court upon a complaint the provisions of S. 195 (1) (b), Criminal P. C. would at once be attracted. Section 195 (1) (b), Criminal P. C. says, inter alia, that no Court shall take cognizance of any offence punishable under S. 211, Penal Code when such offence is alleged to have been committed in or in relation to any proceeding in any Court except on the complaint in writing of such Court or of some other Court to which such Court is subordinate. If the case of the petitioner was false, he would be guilty of an offence punishable under S. 211, Penal Code, but the offence would be one which had been committed in a proceeding in Court because the offence was committed when the false complaint was lodged in Court. Had there been no naraji petition or complaint, then S. 195 (1) (b), Criminal P. C. would have had no operation. The Court could have taken cognizance of the case against the petitioner in accordance with the provisions of S. 190 (1) (b), Criminal P. C. But once there has been a petition of complaint in Court, S. 195 (1) (b), Criminal P. C. comes into operation and there must be a complaint in writing by the Court in which the complaint was lodged or by some other Court to which such Court was subordinate. In this connection I would refer to the case in 43 Cal. 1152.[1] This is not a mere technical error. If the learned Magistrate had made a complaint in writing in accordance with the provisions of S. 195 (1) (b), Criminal P. C. as he was bound to do, the petitioner would have had a remedy by way of appeal under S. 476B, Criminal P. C. In the present case this right of appeal has been denied the petitioner by reason of the procedure adopted by the learned Magistrate.

[5] Having regard to all these circumstances I set aside the order passed by the learned Magistrate and direct him to deal with the naraji petition as if it were a petition of complaint and to proceed in accordance with the provisions of S. 200, Criminal P. C. and the following sections. After he has disposed of the complaint in accordance with the provisions of law, the learned Magistrate may take such steps as he thinks proper in accordance with the provisions of the Code of Criminal Procedure adverted to above and in the light of the observations made above.

D.S. *Rule made absolute.*

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**A. I. R. (34) 1947 Calcutta 440** *[C. N. 138.]*

HARRIES C. J.

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**A I R. (34) 1947 Calcutta 441** [*C N. 139*]

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*Sm Sukumari Debi w/o Gurupada Haldar, Plaintiff and another—Respondents*

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2 ( 41) 45 C W N 931 29 A I R 194' Cal 145 200 I C 453 Kumud Nath
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[2] The trial Court decreed the suit in of both the claims and made an order f very of possession as also for rent as cla the suit together with damages up to of the judgment, provided that the defe fees were paid by the plaintiff within An appeal taken by the defendant to appellate Court was dismissed

[3] Only one point was urged befo present second appeal, and it will b to state the tenant s defence so far a is concerned The suit was brought 1940 and it was on the very next d

a party. In the case before Edgley and Latifur Rahman JJ., as well, a decree for ejectment had been passed, although the suit appears to have been one which was not a suit for ejectment on account of non-payment of rent, and although the special Act had been pleaded. This Court did not set aside the decree so far as it related to ejectment, but merely directed that to the extent that it related to ejectment, the execution of the decree would remain stayed for the period during which the special Act might continue in force. As far as can be gathered from the judgment, this order was passed on the basis of the proviso to S. 3, Bengal Non-Agricultural Tenancy (Temporary Provisions) Act, 1940.

[12] With respect, this view, in our opinion, is not correct. The scheme of S. 3, Bengal Non-Agricultural Tenancy (Temporary Provisions) Act 1940, is that the suits for ejectment on account of non-payment of rent are outside the main provision altogether, and a tenant can claim no relief by way of a stay of the suit under that provision. He must suffer a decree, but after a decree has been passed, the proviso comes to his aid at that stage, for, it provides that although the suit may be one for ejectment of a non-agricultural tenant on account of non-payment of rent, and although the suit could not have been stayed and was not stayed, still, when the stage arrives for the execution of the decree, the tenant defendant may avert execution by putting in the decretal amount, together with the costs of the proceeding. It appears to us that in a case where a suit was one within the main provision of S. 3 of the Act, and not excepted therefrom, and a plea that it should be stayed was wrongly overruled, the decree subsequently passed for ejectment, when it is questioned before this Court in second appeal, cannot be allowed to stand, leaving it to the defendant to have its execution stayed by availing himself of the proviso. The Courts below having proceeded with the suit in direct contravention of the Act, must be deemed to have erred in law and to have passed a decree which they had no jurisdiction to pass. Such a decree can only be set aside and cannot be maintained with the qualification that its execution would be liable to be stayed.

[13] In the case above referred to, the learned Judges appear to have taken the whole of S. 3, including the proviso, as applicable to all kinds of suits for ejectment, the main provision and the proviso being applicable to different stages. That, in our opinion, is not the correct view of the section. The main provision applies only to suits in which the claim for ejectment is grounded in some reason other than non-payment of rent and gives relief against trial of such suits. The proviso applies only to suits of the excepted kind and with respect to them, relief is given not against the trial of the suits, which cannot be stayed, but only against the execution of the decree. Where the suit is one within the main provision but was yet not stayed, the operation of the main provision, on the one hand, cannot be excluded and on the other hand, the proviso has no application. Effect must be given to the main provision.

[14] For the reasons given above, this appeal is allowed. The judgments and decrees of the Courts below, in so far as they relate to the question of the ejectment of the defendant, are set aside and it is directed that the suit shall be deemed to have stood stayed as on and from 30-5-1940. The decrees, in so far as they relate to the claim for rent and damages, are modified in manner that in lieu of the decree passed by the trial Court and upheld by the Court of appeal below, the plaintiff will get a decree for Rs. 913 on account of arrears of rent and damages up to the present date, subject to her paying the necessary amount of the deficit court-fees within one month of the arrival of the record in the trial Court. Since there was no appeal to the lower appellate Court or to this Court with respect to the claim for rent and damages, the deficit court-fees will be payable only with respect to the plaint in the trial Court. On payment of the deficit court-fees within the time allowed above, the plaintiff will be entitled to execute the decree for rent and damages for such balance thereof as may still be found to be owing to her on giving due credit for payments already made by the appellant. In default of the plaintiff-respondent paying the deficit court-fees within the time above allowed, the modification of the decree made by this Court in her favour will stand cancelled. Since success in the litigation has been divided, we direct that each party will bear its own costs throughout.

[15] **Blank J.** — I agree with the judgment which has been delivered by my learned brother. In particular, as I was a party to the decision in Second Appeal No. 1164 of 1942, decided on 11-7-1946,[6] referred to above, I entirely agree with the view now expressed by my learned brother on the topic that the decree must be set aside and not stayed.

G.N. *Appeal allowed.*

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**A. I. R. (34) 1947 Calcutta 444** *[C. N. 140.]*

BISWAS J.

*Hossain Ali and another — Petitioners* v. *Kala Chand Ghose and others — Opposite Party.*

Civil Rule No. 205 of 1946, Decided on 13-1-1947, from order of First Addl. Dist. Judge, Dacca, D/- 4-10-1945.

Bengal Tenancy Act (8 [VIII] of 1885) S 26F
e-emption proceedings — All questions of title
not necessarily excluded from purview of Court
ut no hard and fast rule can be laid down—
plication for pre emption — Objection that pre-
ptor does not fulfil status of co sharer tenant —
urt cannot decline to go into question
Looking at S 26F as a whole, it is imposs ble to
aintain that in pre emption proceedings under that
ection all questions of title are necessarily excluded
rom the purview of the Court The right of pre emption
does not exist in the case of every kind of transfer of a
portion or share of an occupancy holding There are
certain exceptions which are expressly specified in
several clauses of sub-s (1) of the section among which
cl (a) obviously involves questions of title The right of
pre-emption conferred by S 26F arises only if certain
fundamental conditions are satisfied, apart from the
formalities or deposits prescribed by the section The
r ght is a right given to one or more co-sharer tenants
of the holding and it arises only if a port on or share
of the holding is transferred to a person other than a
cosharer If therefore, upon an appl cation for pre
emption an object on is raised that the pre-emptor does
not fulfil the status of a cosharer tenant the Court
cannot very well decline to go into the question Then
again the Court on an application under S 26F should
certainly be competent to go into the question as to
whether the person in whose favour the transfer had
been made was a cosharer tenant already otherwise
than by such transfer But no hard and fast rule can
be laid down It will all depend on the nature of the
question which is ra sed between the parties It may be
that if it involved complicated questions of title the
Court would be well advised in relegating the parties to a
regular title suit for the adjudication of such questions
but if it was only a question of the maintainability of
the appl cation which could be easily disposed of in the
proceedings under S 26A there is no reason why the
Court should decl ne jurisd ction 23 A I R 1936 Cal
167 65 C L J 472 , 45 C W N 658 and 26 A I R
1939 Cal 432 *Ref* [Paras 4 and 5]

(b) Bengal Tenancy Act (8 [VIII] of 1885), S 26F
— Pre-emption proceeding — Transferee is not
necessary party [Para 6]

*Cases referred* —
1 (35) 61 C L J 310 23 A I R 1936 Cal 167
161 I C 973, Nibaran Chandra Bhattacharjee v Hem
Nalini Debi
2 (37) 65 C L J 472 Jogendra Nath Chowdhury v
Golam Samdani
3 ('41) 45 C W N 658 Sindhuram Panja v Ambica
charan Santra
4 (39) 43 C W N 549 26 A I R 1939 Cal 432
I L R (1939) 1 Cal 553 183 I C 489 Basanta
Kumar Churnakar v Durganath Pal

*Bhagirath Chandra Das* — for Petitioners
*Nirmal Chandra Nundy* — for Opposite Party

**Order** —The petitioners in this case claiming
to be cosharer tenants of an occupancy holding
applied for pre-emption under S 26F, Ben Ten
Act in respect of certain portions or shares of
the holding alleged to have been transferred by
opposite parties 2 and 3 to opposite party 1
The application was resisted by opposite party 1
mainly on two grounds. It was contended, in
the first place, that the petitioners had no interest
in the holding, which originally belonged to one
[Mis]rabali and his brother Jumarali, and subse-
[quently on equit]able partition between the
brothers, came to belong exclusively to Misra-
bali, inasmuch as the petitioners were not
the heirs of Misrabali at all in parti
cular petitioner No 1 was not a son of Misra-
bali Secondly, it was alleged that the opposite
party 1 had already acquired the entire holding
from Misrabali and the heirs of Jumarali by
two conveyances Exs A2 and A3 the first of
which was executed by Misrabali in 1921 and the
other by the heirs of Jumarali in 1939

[2] The learned Munsif before whom the
application was filed allowed it overruling the
objection of the opposite party that the peti
tioners were not the heirs of Misrabali As
regards the other objection that opposite party 1
had already acquired title to the holding by prior
purchase the learned Munsif held that this was
a question which could not be gone into An
appeal was taken against the learned Munsif's
order by opposite party 1 The lower appellate
Court found that the petitioners were the heirs
of Misrabali, but directed a remand to the
learned Munsif in order that the question which
he had left undecided should be decided On re
mand the learned Munsif however declined to
go into that question relying on certain deci
sions of this Court namely the decision of
Henderson J in 61 C L J 310[1] and that of
M C Ghose J in 65 C L J 472[2] and re affirmed
his previous order There was a further appeal
against this decision to the learned District
Judge The appellate Court found it necessary
to make another remand The matter again
came back before the learned Munsif where
the same points were re argued This time th
Court carried out the directions contained in th
order of remand Upon the evidence the learn
Munsif found that the earlier conveyances
which the opposite party 1 relied in support
his title had never been acted upon, and that
two transfers on the basis of which the petitio
claimed to pre-empt were valid and opera
In that view, it was held that the petitio
were entitled to pre-empt On appeal that
ment has been now reversed The learned
tional District Judge has set aside the find
the learned Munsif regarding the [illegible]
kobalas, Exs A2 and A3. Upon the [illegible]
his conclusion is that these [illegible]
transactions, as a result of which [illegible]
had acquired title to the [illegible]
there was no [illegible]
could devolve [illegible]
ties 2 and 3 [illegible]
heirs [illegible]
learned Munsif [illegible]
application for [illegible]
[illegible]

*Cases referred :—*
1. Reported in ('44) 31 A. I. R. 1944 F. C. 18 : I. L. R. (1944) Kar. F. C. 46 : 1946 F. C. R. 126 : 212 I. C. 138 (F.C.).
2. ('45) 49 C. W. N. 367, Sambhu Charan v. Hrishikesh Dey.
3. ('45) 49 C. W. N. 638 : 33 A. I. R. 1946 Cal. 65 : 224 I. C. 266, Ajaraddi v. Sonai Bibi.
4. ('45) 49 C. W. N. 30 : 32 A. I. R. 1945 Cal. 177 : 220 I. C. 85, Jadu Nath Roy v. Kshitish Chandra.

*Gopendra Nath Das, Manindra Nath Ghosh and Hemanta Krishna Mitra*—for Appellant.
*Rajendra Nath Das*—for Respondent.

**Judgment.**—This is an appeal against a new decree passed by the learned Subordinate Judge after re-opening an earlier decree under the provisions of the Bengal Money-lenders Act. The real question in the case is what is to be regarded as the principal of the loan. For determining that question the following facts are necessary: Ashutosh Chakravarti, Satish Chandra Chakravarti and others borrowed a sum of Rs. 10,500 on a promissory note from the Bagerhat Loan Company. The said company filed a suit and obtained a decree against all the promissors, namely Ashutosh Chakravarti, Satish Chandra Chakravarti and others. The company however did not proceed to realise the decretal amount from the property of all the judgment-debtors. They selected one amongst them, namely Ashutosh, the father of the plaintiff appellant Indra Sekhar Chakravarti. Ashutosh satisfied the decree and thereafter brought a suit, being No. 170 of 1926 of the Court of the Subordinate Judge at Khulna, for contribution against his co-judgment-debtors. After filing that suit he applied for attachment before the judgment of the properties which belonged to one of the defendants of that suit, namely Satish. On 9th November 1926, the order for attachment was made. On 21st February 1927, that is to say, about two months after the order for attachment had been made Satish transferred his properties which were the subject-matter of the application for attachment before judgment by two *kobalas*, one executed in favour of Rati Kanta Haldar and the other in favour of the latter's wife Raju Bala. The conveyances are respectively Exs. A and A1. On 17th January 1928, Ashutosh obtained a decree against Satish for Rs. 4136 odd in the contribution suit No. 170 of 1926. Thereafter, he filed an application to execute the decree against the properties in respect of which the order for attachment before judgment had been made and which as we have already stated had been transferred by Satish to Rati Kanta and his wife Raju Bala. On 13th June 1928, Rati Kanta and Raju Bala executed a mortgage in favour of Ashutosh for the sum of Rs. 4500 stipulating to pay compound interest with annual rest at the rate of Rs. 10-8-0 per year. The mortgage included as security the plots of land which Rati Kanta and Raju Bala had purchased from Satish on 21st February 1927 by the *kobalas* Exs. A and A1. The recital in the mortgage is as follows:

> "You (Ashutosh) having put into execution the decree in Suit No. 170 of 1927 ? of the Court of the Subordinate Judge of Khulna in which you attached the said properties before judgment, the liability of the debt of Satish Chandra Chakravarti has fallen on our shoulders. In order to make the said purchased properties free from all charges, we by making entreaties to you execute this deed of mortgage in your favour for the total sum of Rs. 4500 in lieu of the decretal amount, as we could not pay money in cash, as well as for our necessary expenses."

After the execution of this mortgage, Ashutosh filed an application in the execution proceeding that he had started against Satish stating that he had received a sum of Rs. 4237 odd from Rati Kanta and Raju Bala and on that footing he entered up full satisfaction of that decree against Satish. The position therefore is that the consideration of the said mortgage was the payment of Rs. 262 odd in cash to Raju Bala and Rati Kanta and the discharge of the liability of Ashutosh's decree which was on the property which they had purchased from Satish after on the footing that the attachment before judgment was before their purchase from Satish. If there was in fact the attachment of those properties at or before the time of the purchase which Rati Kanta and Raju Bala had made from Satish the property would have been liable to be sold in execution of Ashutosh's decree in the contribution suit and by the sale the title which Rati Kanta and Raju Bala had thus obtained by their purchase would have been wiped off. That position is quite clear. If however there was in fact no attachment at or before the time when Rati Kanta and Raju Bala purchased the properties from Satish their title would not have been affected at all by the execution sale and in that case there would be no consideration for the sum of Rs. 4237 odd. The position is clear.

[2] In 1932, Ashutosh filed his suit (being No. 124 of 1932) on the mortgage against Rati Kanta and Raju Bala. Raju Bala did not appear in that suit but Rati Kanta did. Rati Kanta's defence was that there was no consideration for the mortgage as in fact there was no attachment on the properties which he had purchased from Satish at the time of his purchase and that the mortgage was obtained by Ashutosh from him on a false representation that he had in fact attached the properties before Satish's conveyance to him. The learned Subordinate Judge framed the following amongst other issues in that suit.

> Did any consideration pass for the mortgage in question? (Issue 3). Where the lands in suit attached before judgment and are the defendants liable for the claim against Satish Chakravarti ?

and remanded the case to the trial Court for ascertaining the market value of the property in suit The trial Court entrusted the task to one Malik Ghulam Haider, a pleader of Alipur, who was appointed commissioner for the purpose. On 5 3 1944, the parties came to a compromise in the presence of this commissioner according to which it was agreed that the vendees would pay a sum of Rs 500 per bigha to the pre emptor and that the latter would as a result of this payment abandon his claim The money was to be paid by 25 3 1944 failing which the suit was to be decreed in favour of the pre emptor on the assumption that the market value of the property was Rs 385 The vendees deposited a sum of Rs 3 206 4-0 in Court on 24 3 1944, that is, a day before the date on which the payment was due On 1 4 1944, the vendees applied to the Court that the compromise be recorded The pre-emptor denied the existence of the compromise and pleaded that even if an agreement was arrived at between the parties the terms of this agreement had not been complied with The trial Court came to the conclusion that a compromise had been reached but that the terms of the compromise had not been complied with, inasmuch as the vendees had deposited only a sum of Rs 3,206 4-0 instead of a sum of Rs 3,281 4 0 which was due to the pre emptor A decree was accordingly granted to the pre emptor for possession of the land in question on payment of a sum of Rs 665 which was mentioned in the agreement as the market price of the property This order was affirmed by the Senior Subordinate Judge in appeal The vendees have come to this Court in second appeal and the question for this Court is whether the Courts below have come to a correct determination on point of law.

[2] The first question arising in this appeal, namely, whether the decision of the Courts below that time was of the essence of the contract is or is not a finding of fact, is a very short one. Although ordinarily a finding of this kind is regarded as a finding of fact, I am inclined to think that the finding at which the Courts below have arrived in the present case is contrary to the general principles of law and can therefore be set aside in second appeal. The lower Courts have held that time was of the essence of the contract in this case (a) because the agreement executed by the parties makes a specific mention of the date by which payment was to be made and (b) because a contract in a compromise case must be strictly construed It is true that the right of pre emption constitutes an invasion of the principle of free contract and that the party who comes into Court to enforce that right must be careful to comply strictly with the requirements of law, but it must be remembered that this is really a vendee's and not a pre emptor's case It is an accepted proposition that a pre-emptor must establish his right to the property because the right is of a practical nature. The converse is by no means true It has nowhere been laid down that a vendee must also prove his case equally convincingly The fact that law is to be strictly construed with reference to a pre emptor does not lead necessarily to the conclusion that the law must also be strictly construed with reference to a vendee The point at issue in the present case was whether time was or was not of the essence of the contract. In deciding this question, it was obviously the duty of the Court to be guided by the principles enunciated by their Lordships of the Privy Council and by the Courts in this country As these principles appear to have been wholly ignored, I am unable to say that the decision of the Courts below was a finding of fact the correctness of which cannot be contested in second appeal

[3] The second and perhaps the more important question is whether time was in fact of the essence of the contract The general rule is that contracts for the performance of which no definite time is specified must be carried out within a reasonable time, and contracts for the performance of which a definite time has been fixed must be completed within the time limited. In the latter class of cases, Courts are always willing to give relief against mere lapse of time when lapse of time is not essential to the substance of the contract In the Courts of Equity in England, time was not deemed of the essence of the contract unless it had been made so by an express stipulation or necessary implication. In those Courts time was deemed of the essence of the contract in all cases where it could be collected from the terms of the contract that the parties intended that the time for its completion should be strictly adhered to These principles of English law have received statutory recognition in this country by the enactment of S 55, Contract Act which is in the following terms:

[illegible]

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the [illegible] to do such thing at or before the specified [illegible] the promisee is entitled to compensation [illegible] for any loss occasioned to him by [illegible].

If, in case of a [illegible] on account of the promisor's [illegible] to [illegible] at the [illegible] at any [illegible] claim [illegible]

performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so."

[4] This provision of law has come up for judicial interpretation in several decided cases. In A. I. R. 1916 P. C. 89[1] their Lordships held that S. 55 does not lay down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. This authority was followed by a Division Bench of the Patna High Court in 2 Pat. 906.[2] It was there held that where a compromise decree provides that on the defendant's failure to pay the decretal amount by a certain date the plaintiff shall be entitled to a larger sum, the Court had power to extend the time fixed for payment without the consent of the plaintiff. At page 908 appear the following observations:

"On the other hand it seems to be now settled that where the agreement is for the payment of money on a prescribed date and that upon default of payment on that date money or land is to be forfeited, time is not of the essence of the contract. Indeed the rule is clear that in every case the Court must determine upon the facts of that case whether relief against forfeiture is to be given or not."

[5] Our own High Court has taken a similar view in A. I. R. 1931 Lah. 205.[3] It has held that the mere fact that time is specified for the performance of a certain act does not prove that time is of the essence of the contract. It is the duty of the Courts while construing a contract to look to the pith and substance of the agreement and decide whether time was or was not essential to the substance of the contract. In a recent case (S. A. No. 1000 of 1942) Abdul Rashid J. examined a number of authorities bearing on the point and came to the conclusion that the Court has full discretion to extend time for payment if upon a review of the entire circumstances of the case it came to the conclusion that time was not of the essence of the contract. He pointed out that time may be of the essence of the contract if it appears that a person has made a concession as a consideration for the contract, as for example, when a decree-holder, who has been awarded a particular sum accepts a sum in full satisfaction of the decree if it is paid by a fixed date.

[6] Now, can it be collected from the terms of the contract in the present case that the parties intended that the time for its completion should be strictly adhered to? The contract was in the following terms:

"The plaintiff shall receive from the defendants an amount at the rate of Rs. 300, per bigha out of the sale consideration paid by him. That is, he shall receive the same from the defendants before the Court on 10-3-1944; the date fixed and give up his right of pre-emption in their favour. The plaintiff has already taken possession of the land in dispute. Hence the decree passed by the Court in favour of the plaintiff shall be considered as cancelled and the defendants shall be entitled to take possession of the land formally through Court.

The defendant shall pay the amount to the plaintiff by 25-3-1944, otherwise the market value of the land shall be considered as Rs. 665. The parties have willingly accepted this. In case a breach of the promise on the part of the defendants, they (defendants) shall pay the plaintiff Rs. 335, out of Rs. 1000, which they have already received. The parties shall bear their own costs of suit and appeal."

[7] It is true that the contract specified the date by which it should be performed but it does not expressly declare that time is of its essence. On the other hand, the other circumstances indicate that performance was to be rendered within a reasonable time. The vendees purchased the land for a sum of Rs. 1200. The pre-emptor brought his suit for possession and obtained a decree on condition that he paid a sum of Rs. 1000 to the vendees. This decree was set aside in appeal and the case was remanded to the Court below for ascertaining the market value of the land. On 5-3-1944 the parties came to a compromise by which it was agreed that the pre-emptor would relinquish his claim on receipt of a sum which the pre-emptor estimates at Rs. 3281-4-0 and the vendees at Rs. 3206-4-0. This amount is considerably in excess of the price which the vendees are said to have paid and grossly in excess of the price which the pre-emptor considers should have been paid for it. It will thus be seen that the pre-emptor was making no concession what so ever to his opponents. On the other hand, he was driving as hard and if I may say so, as unconscionable a bargain as he could. The vendees agreed to pay the money by 25-3-1944 but time was not made the essence of the contract either by express stipulation or by necessary implication.

[8] Nevertheless the vendees have shown the utmost anxiety to fulfil their part of the contract within the time specified for the performance thereof. On 24-3-1944, that is, a day prior to the date fixed for performance, they applied to the Court for a direction as to the exact amount of money which they were required to pay to the pre-emptor. This application was returned to them without any order on the ground presumably that a Court is not the legal adviser of a party to a litigation. The vendees who are illiterate Jats of the Ferozepore District calculated the amount to the best of their ability and

*found that they were required to deposit* only a sum of Rs 3206 4 0 This estimate has been found to be incorrect inasmuch as it falls short of the real amount by a sum of Rs 1 14 0 according to one calculation and Rs 75 according to another. *The vendees* appear to have made genuine efforts to comply with the terms of the compromise and they actually paid a substantial sum before the due date In considering whether time is the essence of the contract where it is not expressly so made by the parties, the fact that the pre emptor has got substantial portion of what he contracted for is a determining factor The mere fact that a small amount remained outstanding owing to a *bona fide* mistake cannot entitle the pre emptor to repudiate the contract

[9] For these reasons, I would accept the appeal, set aside the order of the Courts below and extend the time for specific performance to 25 11 1946 The vendees have expressed their willingness to pay a sum of Rs 75 to the pre-emptor in order that the total amount paid to him in accordance with the agreement should make up the figure of Rs 3281-4 0 The payment of Rs 75 must be made on or before 25 11 1946 so that by that date nothing more remains to be paid out of the sum of Rs 3281 4 0. If the payment is made, the suit will stand dismissed with costs, if the payment is not made, the appeal will be deemed to have been dismissed with costs

N. S *Appeal accepted*

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**A. I. R. (34) 1947 Lahore 355** *[C. N 88.]*
**FULL BENCH**

ABDUR RAHMAN, MAHAJAN, CORNELIUS FALSHAW AND S A RAHMAN JJ

*Duni Chand & Co — Appellant* v. *Narain Dass & Co, and another —Respondents*

...1945, Decided on ... hammad and

... 207 — Power ... to refer to arbitration

The intention of the statute in regard to references to arbitration in the course of a voluntary winding up appears clearly from Ss. 152, 205 and 207 (iii) to be ... shall be reserved to the Com...

... to arbitration, it is not permissible to include that right within the general words employed to define the executive and the residuary powers of a liquidator in cls (d) and (i) of S 179 The liquidator has also no inherent po... ...

*Abdur Rahman, Mahajan Falshaw and S. A Rahman JJ* —Even if arbitration may be regarded to be one of the methods by which a compromise may be arrived at, the power to enter into a compromise, which an agent may sometimes possess cannot authorise him to refer the matter to an arbitration so as to bind his principal unless that power has been expressly conferred on him A resolution to wind up a private limited company by voluntary liquidation does not make it extinct or incapable of exercising any function whatsoever and it does not clothe a voluntary liquidator with the power to refer the matter to arbitration on the ground of expediency, for the company can if desired, resolve so to do in spite of liquidation [Para 14]

*Cases referred —*

1 ('28) 50 All 867 15 A I R 1928 All 553 110 I C 695, In the matter of Dehara Dun Mussoorie Electricity Tramway Co Ltd.
2 ('36) 17 Lah 722 23 A I R 1936 Lah 721 164 I C 393 (F B), Sita Ram Balmukund v Punjab ...

4 ...

Doherty

*R C. Soni and Jagan Nath Seth*—for Appellant

*D R Sawhney and Ram Krishen Juneja for Kishori Lal*—for Respondents

ORDER OF REFERENCE

*Din Mohammad and Mohammad Sharif JJ.* — The only question involved in this appeal is whether a *liquidator, in a voluntary* winding up can refer any matter to arbitration. Achhru Ram J, gave a reply in the negative, mainly relying on 50 ALL 867[1] a case decided by Mukerjee J sitting singly. The appellant, however, has *challenged the correctness of this* decision, basing his argument, *inter alia* on some of the observations made in a Full Bench decision of this Court reported as 17 Lah 722[2] This judgment, however, has been dissented from in *(1940) 1 Cal. 335*[3] *and I L R (1941) Mad 2*[illegible]*5*[4] Although the arbitration in the present case was under the Arbitration Act and not under the Code of Civil Procedure we yet consider that the ...

## Judgment of the Full Bench.

**Cornelius J.** — The facts of the case out of which this Letters Patent Appeal arises are as follows: A private company with limited liability known as Messrs. Narain Das and Company Limited went into voluntary liquidation on 30-7-1935, and R. B. Narain Das, a member of the company was appointed the voluntary liquidator. In the course of the liquidation, for the purpose of settling a claim against the company by a firm in Ferozepore named Messrs. Duni Chand and Company, the liquidator and the Ferozepur Company on 29-2-1936, by a writing, referred their dispute to the arbitration of one Seth Jetha Nand. Seth Jetha Nand made an award on 30-6-1936, in which he tabulated certain items which were due to Messrs. Duni Chand and Company, and certain sums which they owed to Messrs. Narain Das and Company Limited. It is calculated that a balance of Rs. 1890 remained due upon this account to Messrs. Duni Chand and Company who brought a suit on 29-6-1942, on the basis of the award to recover this sum, citing as defendants firstly, Messrs. Narain Das and Company Limited, secondly, Messrs. Narain Das and Company, and thirdly, R. B. Narain Das. In the course of the suit, it was made to appear that Messrs. Narain Das and Company Limited had been finally dissolved, and the suit accordingly proceeded against defendants 2 and 3 only, on the basis that the assets of Messrs. Narain Das and Company Limited had come into the hands of Messrs. Narain Das and Compnay and that if the assets had been applied in satisfaction of the liabilities of Messrs. Narain Das and Company Limited to the exclusion of the plaintiff's claim, the voluntary liquidator R. B. Narain Das was personally liable to make good the plaintiff's claim. The suit was tried by L. Tara Chand Aggarwal, Commercial Sub-Judge, Lahore, who held that R. B. Narain Das had no power to refer the dispute to arbitration, and accordingly all proceedings before the arbitrator as well as his award were void. Certain other issues were also raised in the case, but with these we are no longer concerned. The suit was dismissed mainly on the finding mentioned above. An appeal was taken before the District Judge, who upheld the trial Court's decision on this point, and a further appeal to this Court was dismissed on the same ground by a learned Single Judge, who however granted the appellant a certificate for the purpose of a Letters Patent Appeal. Such an appeal was filed and was originally placed before a Division Bench consisting of Din Mohammad and Mohammad Sharif JJ. who, on 27-2 1946, forwarded the case to the Hon'ble the Chief Justice with a recommendation that the appeal should be heard by a larger Bench, as it appeared to them to involve reconsideration of certain observations made in a Full Bench decision of this Court published as 17 Lah. 722.[3] Accordingly, the appeal has been referred to a Bench of five Judges for disposal.

[2] In his written statement, R. B. Narain Das did not make a categorical reply to the allegation that he had referred the dispute in question to the arbitration of Seth Jetha Nand. He said vaguely that :

> "Some alleged disputes so far as defendant 3 remembers were referred to arbitration, but he does not remember the details of reference nor does he remember if the alleged reference was in writing."

The position was corrected by a statement of counsel made on his behalf on 22-1-1943, which was clearly to the effect that R. B. Narain Das acting as liquidator had signed the reference. Thus, the only ground upon which the validity of the proceedings before the arbitrator culminating in his award can be challenged is that R. B. Narain Das had no power to refer the dispute to his arbitration on behalf of the company. The Courts below have relied mainly upon a Single Bench decision of the Allahabad High Court published as 50 ALL. 867,[2] where the question was whether an Official Liquidator had power to refer a dispute on behalf of the company in liquidation, to arbitration under Sch. II, Civil P. C. The learned Single Judge referred to S. 179, Companies Act, 1913, and pointed out that it contained no mention of arbitration. As to the general cl. (1), which permits a liquidator "to do all such other acts as may be necessary for winding up the affairs of the company and distributing its assets" it was held that it related exclusively to powers necessary for winding up the business of the company, and it was further remarked that where as in cl. (a) express power to institute legal proceedings had been given, the general clause could not be construed as including "a power to refer to private arbitiration." The learned Judge then referred to S. 152 of the Act which empowers companies to refer matters to arbitration under the Arbitration Act, and on the considerations firstly that the powers of a living company may not be co-extensive with the powers exercisable by a liquidator and secondly that the liquidator's knowledge and information of men and things may not be co-extensive with that possessed by the directors, concluded that the fact that a living company was allowed to refer disputes to arbitration was not sufficient for concluding that an Official Liquidator also had the like power. Finally, the learned Judge took notice of the fact that under S. 234 of the Act, the liquidator was conditionally empowered to compromise certain claims against the company, and on a consideration of the con-

trast provided by the absence of a reference to arbitration among the powers of the liquidator, as well as of certain obvious differences between sanction to a compromise of which the terms are known to the Court giving sanction and a reference to a domestic tribunal whose decision could not be foreseen concluded that this power was intentionally withheld from the liquidator by the Legislature The learned single Judge of this Court from whose judgment the present appeal has been brought agreed with this view, which he thought could be extended to the case of a liquidator in a voluntary winding up Since by s 207 (iv), the latter is invested with all the powers of an official liquidator enumerated in s 179, and may exercise them without the leave of the Court, the Allahabad precedent affords valuable guidance for the decision of the present case

[4] Mr R C Soni for the appellant has attempted to argue that a power to refer disputes affecting a company in voluntary liquidation can be spelled out of the provisions of the Companies Act in favour of the liquidator, and that in any case, such a power must be deemed to vest in the liquidator as incidental to the powers expressly conferred upon him by the Act In support of the first argument, he referred to ss 152, 179, 205 and 207, Companies Act (As the reference was made in 1936 the sections will be considered as they stood prior to the extensive amendment of the Act carried out in 1937) By s 152, a company is given power to refer differences between itself and any other company or person by written agreement to arbitration in accordance with the Arbitration Act, 1899 In sub s (2), companies are expressly empowered to delegate to the arbitrator power

[illegible]

cease wound bene ficial winding up and the proviso makes it plain that the "corporate state and corporate powers of the comp[illegible] dissolved' [illegible] are enumer[illegible] voluntary winding up particular reference was made to tho e enumerated in clauses (iii) and (iv) Clause (iii) lays down that upon the appointment of a liquidator

'all the powers of the directors shall cease except so far as the company in general meeting or the liquidator, sanctions the continuance thereof'

and by cl. (iv) the liquidator is authorised to exercise "all powers by this Act given to the Official Liquidator in a winding up by the Court," "without the sanction of the Court" The principal section conferring powers upon an Official Liquidator is s 179 which is divided into nine clauses, of which cls. (a), (d) and (i) need special mention None of the clauses confers, directly or indirectly, the powers of referring disputes to arbitration Clause (a) gives the liquidator power to 'institute or defend any suit or prosecution or other legal proceedings . in the name and on behalf of the company,' cl. (d) empowers him 'to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents ," and cl (i) confers the residuary power to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets' Mr Soni argued that by the operation of cl (iii) of s 207, cls (d) and (i) of s 179 read with cl (iv) of s 207 should be interpreted as conferring upon the liquidator in a voluntary winding up, powers to refer to arbitration disputes arising in the winding up, which affect the company, on behalf of the company The argument depends upon whether or not there are in the Act words which can be interpreted to mean that all the powers of the directors, and all the corporate powers of the company devolve upon the liquidator when it

[illegible]

directors of corporate powers on behalf of the company subject to the sanction of the liquidator when a voluntary liquidation is in progress

[5] Now, a liquidator is an agent employed for the purpose of winding up the business of the company, and an agent can only exercise such powers as are conferred upon him by the principal, or by the statute The powers of a company in relation to a winding up are strictly limited by the Act, and do not provide for delegation to, or conferment upon, the liquidator of any powers by the company The Act in several sections clearly defines and delimits the powers of a voluntary liquidator, who by cl (ii) of s 207 is to be appointed "for the purpose of winding up the affairs and distributing the assets of the company The Act nowhere employs language which can be understood to convey to the liquidator plenary powers, co-extensive with those exercisable by the company either before or after the commencement of the winding up On the contrary, there are sections of which s 234 may be particularly mentioned, which clearly provide that in certain very important respects, the liquidator can only act under the authority of the company exercised under the proviso to s 205, which preserves the corporate powers of the company, notwithstanding that

it has gone into voluntary liquidation. Section 234 relates to (a) payment of creditors in full, (b) compromises with creditors, involving acceptance of liability by the company, and (c) compromises with debtors, involving relinquishment of rights by the company, and provides the liquidator in voluntary winding-up with powers to make such payments and effect such compromises, *subject to the sanction of an extraordinary resolution of the company.*

[6] It seems to me that since the Act clearly delimits the powers exercisable by a liquidator, and expressly reserves other powers for exercise by the company, in the course of a voluntary liquidation, it is not permissible to conclude from the mere fact that the liquidator is empowered to sanction the exercise of corporate powers on behalf of the company, that he is invested with all such corporate powers himself. The power of sanction is one of the expressed powers of the liquidator and its exercise does not, in my opinion, involve supersession of the corporate powers reserved to the company by the Act. These powers still remain with the company, and discretion whether or not they shall be exercised vests exclusively in the company. The functions of the liquidator and of the company, in relation to the winding-up remain distinct, notwithstanding that the liquidator is given this express power of control over the directors' acts. The distinctness is emphasized by the fact that such control is also exercisable, independently of the liquidator by the company.

[7] The conclusion for which Mr. Soni contends is one which the words of the statute will not bear. On the contrary, the intention of the statute, in regard to references in the course of a voluntary winding-up appear clearly from Ss. 152, 205, and 207 (iii) to be that the necessary power shall be reserved to the company, as one of its corporate powers, and that it may be exercised on the company's behalf by the directors, who by Art. 71 in Sch. I to the Act are to manage the business of the company, and to exercise all its powers subject to certain restrictions. The directors cannot, of course, act unless they are empowered by the company in general meeting, or by the liquidator, and consequently the decision whether or not the references shall be made, rests either with the company, or with their statutory agents for the exercise of their corporate powers, namely, the directors. In view of the existence of clear provision in the Act governing the exercise of the right to make references to arbitration, it is obviously not permissible to include the right with the general words employed to define the executive and residuary powers of a liquidator in clauses (d) and (i) of S. 179. These words must be construed *ejusdem generis* with the preceding words in the clauses in which they appear, as well as in the whole section, and when they are so construed, and full effect is given to the absence of express mention of arbitration in the section, and to the fact that in relation to the powers of the company, it is expressly mentioned in S. 152, the conclusion cannot be escaped that the relevant power has been withheld from liquidators by the legislature.

[8] In support of his argument Mr. Soni referred to A. I. R. 1935 P. C. 79[5] and (1921) 2 Ch. D. 161,[6] but so far as I can see neither of these cases has any bearing upon the question before us. In the first case, the question related to the power of instituting and defending suits, which plainly belongs to a liquidator in a voluntary winding up, under S. 207, cl. (iv), read with S. 179, cl. (a). As to the second case, Mr. Soni relied upon certin remarks contained in the judgment, as conveying the sense that when the powers of directors cease on the appointment of a liquidator in a voluntary liquidation, all these powers are vested in the liquidator. There are in fact no words in the judgment in that case which can suffice to support such a conclusion, and moreover, even if there were, the case could hardly provide valuable guidance since it related to a compulsory liquidation, and the decision turned upon the terms of a different statute from that which we are called upon to interpret. No question arose in that case of the right of a liquidator to refer a dispute to arbitration.

[9] It may here be stated that the sole question decided by the Full Bench of this Court in 17 Lah. 722[2] was whether in view of the terms of S. 152, it was open to a company to make a reference to arbitration otherwise than under the Arbitration Act, 1899, i. e. under Sch. II, Civil P. C. The judges were unanimous in thinking that S. 152 merely enabled companies to act in accordance with the Arbitration Act, when they preferred to do so, but did not make that procedure obligatory upon them. The matter had arisen in relation to a reference by parties, one of which was a company, which had resulted in an award and this award had been filed in the Court of a Subordinate Judge under Sch. II, Civil P. C., whereupon it was objected that under S. 152, the award could only have been filed in the Court of the District Judge. The finding was that the proceedings in the Court of the Subordinate Judge were not illegal. Both in regard to the facts as well as in relation to the law applying, I can see no similarity between that case and the present case, and accordingly I do not consider it necessary to examine in detail any observation

made in that judgment, since this would be wholly irrelevant for the purposes of the present decision

[10] The argument that a power to refer disputes to arbitration is an incidental power belonging to a liquidator proves on examination to be equally unsound It should be remembered that the word "incidental does not imply any casual or fortuitous connection In a legal sense as applied to powers, it means a power which is subsidiary to that which has been expressed and of an instrumental nature in relation thereto, which is both necessary and proper for the carrying into execution of the main power which has been expressly conferred It has been seen already that the Act contains provision reserving to the company the power to make such refer ences during a voluntary winding up There appears to be no principal power vesting in the liquidator of which the execution would be pre vented or appreciably hampered if the power of reference were not available The contention that reference to arbitration provides a very expedi tious mode of settling disputes can, in the circumstances be given no weight mere expedi tion in this respect cannot justify excess of his powers by a liquidator Mr Soni attempted to draw a parallel between a liquidator in a wind ing up and a receiver in an insolvency, and invited reference to the provisions in the Insol vency Acts enabling receivers to refer disputes concerning the insolvents estate to arbitration The comparison only serves to weaken his case for the same legislature, if it had the like inten tion in relation to liquidators, might have been expected to confer the relevant power on them, in the same way There is an essential difference between liquidators and receivers in insolvency in the relevant respects which is that the estate of the insolvent vests in the receiver, but the liquidator does not become vested with the assets and liabilities of the company He is merely an agent provided with statutory powers for wind ing up the company's affairs and distributing its assets, and this would appear to be the true reason why he does not possess the power of referring disputes on behalf of the company to arbitration As is stated in Comyn s Digest, Arb D 2

[illegible]

The liquidator, not being vested with rights of the company therefore possesses *no power* [illegible] himself to submit any question which involves the company's rights to arbitration It has been seen that the Act requires him to obtain the *explicit sanction* of the company by an extra ordinary resolution, to any compromise involving relinquishment of rights or acceptance of liabi lity by the company Now a compromise is essentially a mode of terminating a controversy by the method of making mutual concessions, as distinguished from adjudication on the basis of exact ascertainment of the opposing rights in a compromise 'the parties agree not to try it out but to settle it between themselves by a give and take arrangement,' (Stroud s Judicial Dic tionary) It is essential for the purpose of a compromise that each party thereto should be empowered to make the necessary concessions The terms of S 234 preclude the possibilty of a liquidator, having any inherent power to make concessions or accept liability on behalf of the company and it is permissible to conclude that for this reason he also lacks the power to refer a dispute to arbitration on behalf of the company For, arbitration does not differ in kind from compromise, but only in point of method In a compromise the parties themselves make the give and take arrangement , in an arbitration, this is done by the arbitrator and it is obvious that the determination of the question how much each party is to give and how much it is to take may frequently be easier for a neutral person than for the contestants themselves In fact 'arbitration' is one of the meanings according both to general and to law dictionaries, attaching to the word 'compromise For example, in Murray s Dictionary, one of the meanings of the word 'compromise" is given as under 'To entrust the matter [illegible] award" In Wharto [illegible] ings given ' [illegible] mutual promise by two or more parties at *difference to refer the ending of their con troversy to arbitrators'* Reference may also be made to the well known authorities which lay down in relation to the word "compromise" as used in O 23, R 3, Civil P. C., that it in cludes an award given by an arbitrator upon a reference made to him by the parties in a pending suit, without an order of the Court authorising such reference Two Full Bench decisions to this effect are [illegible] 908[7] and A. I. R. [illegible] In the former *case*, there [illegible] Martin C. J., [illegible] advantage [illegible]

"[illegible]
[illegible]"

[illegible]

nor can any such power be claimed for him as an incidental power in relation to any of his express powers under the Act.

[11] Mr. Soni then argued that notwithstanding that the liquidator may not have been authorised to make the reference, the award is binding on the company, in favour of the third party, namely Messrs. Duni Chand & Co. and the company may seek a remedy separately against the liquidator for having acted in excess of his powers. In support of this argument, two English cases were cited which do not appear to be strictly in point. The first is reported as (1903) 1 K. B. 477.[9] There a compromise had been made by a liquidator of a company in voluntary liquidation of a claim by the company against a third party. This required the sanction of an extraordinary resolution of the company, which had not been obtained. Certain other facts appearing from the judgment seem to have been special to the case e. g. that while the compromise in the case was standing another action had been brought in respect of the same subject-matter, but the main ground upon which the judgment, which was to the effect that the compromise was binding on the company, proceeded seems to have been to have that if the third party could not object to the compromise, the liquidator and consequently the company must also be bound by it. The decision that the third party was bound by the compromise rested on an earlier authority. A further ground given in support of the decision was that the question whether the liquidator had obtained sanction was a matter relating to the internal management of the company and a stranger dealing with the liquidator was not to see that every formality had been duly satisfied in relation to the liquidator's action. These points are hardly relevant to the case before us, which relates to a decision by an arbitrator, since here the question is whether the arbitrator had authority to act at all. The matter would have been different if the liquidator had compromised the claim with Messrs. Duni Chand & Co. at a certain figure; in that case, if the liquidator had not armed himself with authority from the company as required by S. 234, before entering into the compromise, it might have been argued on behalf of Messrs. Duni Chand & Co. that they could not be prejudiced as the matter of the sanction was one relating to the internal management of the company. But here, the decision of the dispute was referred to an arbitrator and all his proceedings as well as his award depend for their validity as against each of the parties thereto, upon the validity of the reference by either party, and it is clear that the reference on behalf of the company was made by a person who had no power to do so. Therefore the arbitrator's proceedings were plainly without jurisdiction and his award is without effect. The second case relied upon by Mr. Soni is even more remote from the facts of the present case. It is (1861) 3 L. T. 81,[10] where the question arose as to the competency of an appeal filed by a liquidator before the House of Lords, which lacked the sanction of the original Court. It was found on the basis of authority that such leave was not a necessary preliminary, and that the liquidator could always appeal at the peril, if unsuccessful, of being deprived of his costs.

[12] Finally, Mr. Soni argued that in any case the award should be held to be valid against R. B. Narain Das, but he was unable to deny that the award itself did not make R. B. Narain Das personally liable, and he was unable to suggest any other ground upon which, irrespective of the award, R. B. Narain Das could be held liable for payment of the money awarded against Messrs. Narain Das & Co. Ltd.

[13] For these reasons, I consider that the decision of the learned Single judge in this case is correct, and I would accordingly dismiss this appeal, but as the plaintiff company is being made to suffer on account of having adopted a mistaken procedure, for which the liquidator R. B. Narain Das was at least equally responsible with themselves, and as the legal question was not free from difficulty, I would direct that the parties should bear their own costs throughout.

[14] **Abdur Rahman J.**—I agree but would like to add that even if arbitration may be regarded to be one of the methods by which a compromise may be arrived at, the power to enter into a compromise, which an agent may sometimes possess, cannot authorise him to refer the matter to an arbitration so as to bind his principal unless that power has been expressly conferred on him. A resolution to wind up a private limited company by voluntary liquidation does not, as suggested by learned counsel for the appellant in his address, make it extinct or incapable of exercising any function whatsoever and it does not clothe a voluntary liquidator with the power to refer the matter to arbitration on the ground of expediency for the company can if desired, resolve so to do in spite of liquidation.

**Mahajan J.** — I agree both with Cornelius and Rahman JJ.

**Falshaw J.**—So do I.

**S. A. Rahman J.**—So do I.

D.H. *Reference answered in the negative.*

*A. I. R. (34) 1947 Lahore 361 [*C N 89.*]

SPECIAL BENCH

MUHAMMAD MUNIR, TEJA SINGH AND MOHD SHARIF JJ.

*S Gurbakhsh Singh — Petitioner v Emperor.*

*In the matter of the "Preet Lari", a monthly Punjabi (Gurumukhi) Magazine of Amritsar.*

Criminal Original No 1 of 1947, Decided on 24 3 1947, from order of Governor of the Punjab, D/ 2 1-1947

(a) Press (Emergency Powers) Act (1931) S 4 (1) (d) — Newspaper article — Question whether it is hit by Act—Article how to be read—Standard to be applied

It is a well known canon of interpretation that in order to find out whether a particular article appearing in a paper or a journal is hit by a penal enactment like the Press (Emergency Powers) Act, because it produces or tends to produce a certain effect, the article must be read as a whole and in a free and liberal spirit It is not fair to pick out a few words or even sentences The standard to be applied is that of an average reader belonging to the class of people for whom the newspaper or the journal is intended or among whom it has circulation and not that a of critic [Para 5]

*Held* (*Per majority of Full Bench — Munir J. contra*) that the article in question was not hit by S 4 (1) (d) of the Act [Paras 10 and 11]

*(b) Press (Emergency [illegible]

(1 [illegible]

In [illegible]

— [illegible]

Br [illegible]

wi [illegible]

of a particular class of politicians whose object is to maintain and safeguard the British Empire Where, therefore, an article in a newspaper attacks British Imperialism for having created an atmosphere of communal hatred and jealousy, it cannot be said that the phrase 'British Imperialism' was euphemistically used for British Government in India and that, therefore the article tended to bring into hatred or contempt that Government [Para 8]

(c) Press (Emergency Powers) Act (1931), S 4 (1) (d) — Question as to particular tendency of writing — Writer's intention, if relevant in determining question

Though the intention of the writer is not a deciding factor for the determination of the question whether or not a writing has a particular tendency, it is not altogether irrelevant, particularly so when the plea is that the words used do nothing more than bring out the intention that was uppermost in the writer's mind 34 A I R 1947 Nag 1, *Rel on* [Para 9]

(d) Press (Emergency Powers) Act (1931) S 4 (1) (bb) and (d) — Question whether article offends against law of sedition or is hit by Press Act — Surrounding circumstances if can be considered—Principle to be followed—Difference in clauses and S 124-A Penal Code—Penal Code (1860), S 124 A

In judging whether a particular article offends against the law of sedition or is hit by the Press Act, the C[illegible]rt must take into co[illegible]

[illegible]

whether a writing is seditious or whether it is hit by cls (bb) and (d) of S 4 (1) Press Act, is the same, the only difference being that whereas under S 124 A, Penal Code, it is necessary to prove sedition as defined therein, under the Press Act, matter which tends directly or indirectly to incite to sedition is also included and under the Ordinance by which cl (bb) is inserted in S 4 (1), not only when this is intended but also when it is likely to produce that result 34 A I R 1947 Nag 1 and 29 A I R 1942 F C 22 *Rel on*, 33 A I R 1946 Lah 22, *Ref* [Para 9]

(e) Press (Emergency Powers) Act (1931), S 4 (1) (d) — Tendency to excite feelings of hatred — Words which have become stock-in-trade of average politicians, if have such tendency

Where the words used in a newspaper article are very frequently met both in speeches delivered from public platforms and in writings in the public press and, in fact belong to that class of accusations which have now become a stock in trade of an average politician, they cannot have the tendency to excite feelings of hatred against the Government 29 A I R 1942 F C 22 *Rel on* [Para 10]

*Cases referred* —

1 ('42) 29 A I R 1942 F C 22 I L R (1942) Kar. F C 55 1942 F C R 38 200 I C 289 (F C), Niharendu Dutt v Emperor

2. ('47) 34 A I R 1947 Nag 1 I L R (1946) Nag 865 226 I C 590, Bhagwati Charan v Provincial Government

3 (1917) 1917 A C 406 86 L J Ch 568 117 L T 161 61 S J 478, Bowman v Secular Society Ltd

4 ('46) 33 A I R 1946 Lab 22 223 I C 120 (S B), Harkishen Singh v Emperor

*Gopal Singh and Gurdev Singh*—for Petitioner

*B K Khanna for Advocate-General*—for the Crown

**Munir J** —This is an application under S 23, Press (Emergency Powers) Act of 1931, by Gurbakash Singh, publisher of the "Preet Lari", a Gurmukhi monthly paper, published from Preet Nagar in the district of Amritsar, to set aside an order of the Provincial Government under sub s (3) of S 7 of the Act requiring him to deposit with the District Magistrate, Amritsar, security to the amount of Rs 1,000 on the ground that the article headed "*anhera te channan*", published in the combined issue of the paper for November and December 1946 contained words of the nature described in clause (d) of sub s (1) of S 4, of the Act

[2] The translation of the article is printed at pages 3 to 6 of the paper book and it is unnecessary to reproduce it verbatim as objection is taken only to a few sentences in it The article gives a graphic description of the communal disturbances that took place at several places in this country and alleges that British Imperialism was responsible for it The article also refers to some instances of communal harmony and unity and there can be no doubt that it was with the object of promoting communal concord The only portion to which objection is taken by the Crown is that in which the writer holds the British Government in India responsible for the spread of communal hatred and discord In order to bring out the precise point that requires determination in this case it is necessary to reproduce that portion verbati[m]

papers made no mention of the efforts made both by Hindus and Muslims to save the country from the depredations of goondas of their own respective communities and the fact that Muslim and Hindu labourers of the Calcutta Labour Union formed different joint parties and went to extinguish the flames of riot at Noakhali. The subsequent paragraphs are devoted to the descriptions of "Islands of life", i. e., the places where people of different communities were working together for unity and concord. Paragraph 11 begins with the words :

"Today, I take you to these islands of life so that you may see light in the utter darkness of today, so that you may in the disappointment prevailing to day, have faith in the beautiful future of India."

Then is referred to a letter by one Wali Ullah, a tramway worker at Calcutta, published in the labourers' organ "Swadhinta.[1]" Paragraph 12 relates to Hasanabad which the author regards "as the biggest island of life which is now-a-days surrounded by deadly waters of hatred," and is described in the words :

"It adjoins the ilaqa of Noakhali and about two miles to this side of Hasanabad the forces of death were dancing but at Hasanabad and little further in one hundred and eighty villages, life was overpowering death."

Paragraph 13 says :

"Eighty thousand Hindu and Muslim peasants live in those villages. They have been fighting unitedly against Jagirdars since 1930 and have been facing the bullets of the police together. They are organised as Kisan Sabha. When the disturbances began at Noakhali, the Kisan Sabha formed a Jatha of one thousand Hindu and Muslim volunteers, who saved their village from the hands of outside *goondas*, day and night. The *goondas* came. They said to Muslim volunteers, "We will kill Hindus only and not touch you." They appealed to them in the name of religion; but Hindus and Muslims joined together and pushed them back. Thus the forces of life and of death grappled with each other day and night."

The next paragraph (NO. 14) which is also alleged to contain objectionable words may be quoted *in extenso* :

"One thousand organised peasants by erecting a Bund of their bodies stopped the flood of hatred from carrying away the seedling of Independence. The Kisan leaders told the people that the riots were the machinations of Imperialism. Thus, the unity of the people saved eighty thousand inhabitants from being ruined. Fifty thousand oppressed persons who fled from the hell of Noakhali came to this *ilaqa*. The hunger-stricken Hindu and Muslim Kisans opened free kitchens for those oppressed people and gave them shelter."

The paragraphs that follow describe a few other incidents at Hasanabad. The impression that these incidents made upon the writer's mind may be given in his own words :

"I said to myself. This is not the light of the lamps of Kisan watchmen only, but is the ray of hope of the Bengal's future.

When I returned from Hasanabad, I was sure that the Light of Hasanabad will gradually overshadow the darkness prevailing outside."

In the last two paragraphs the writer draws the lesson, viz., "mass organisation on the basis of equality," in the following words : "Ordinances and military forces only throw dust in the eyes of the people. Instead of checking the disturbances, they enhance the powers of Imperialism which bring about riots."

"The need of the hour is that all patriots should unite together against the havoc caused by the disturbances. They should rise to the occasion like soldiers and learn a lesson from the Light of Hasanabad. They should stop the flood of death with a Bund of unity, so that the newly sprouted seedlings of Independence may grow into a crop, so that in joint battles which are yet to take place in new fields this seedling may be able to grow."

[8] The learned Advocate-General contended that the phrase "British Imperialism" was euphemistically used for British Government in India and the article, therefore, tended to bring into hatred and contempt that Government. My learned brother Muhammad Munir J., whose judgment I have had the advantage of reading agrees with the counsel on both these points. But with all deference, I do not find it possible to accept this contention. British Government in India or "Government established by law in India," to quote the exact words of clause (d), has nothing to do with British Imperialism which represents the cult of a particular class of politicians whose object is to maintain and safeguard the British Empire. In the present days, even His Majesty's Government in Britain has ceased to be imperialistic, but even if it be assumed that they can be described as imperialist because they are presiding over the whole Empire, no such description can apply to the Government established by law in British India. The writer of the article has scrupulously confined his criticism to the policy of the British Imperialism and there is not a word in the article which could be taken to refer to the Indian Government. The learned Advocate-General drew our attention to the sentences appearing in the middle of the third paragraph of the article wherein the word "master" was used and he argued that the reference was clearly to the Government of India which were the masters. But, a reference to the very first sentence of the paragraph would show that the word "master" is used for British Imperialism. The words are :

"Our slave brethren ...... committed such acts of oppression upon their fellow slaves, as their 'master' the British Imperialism had seldom practised during the last one hundred years."

The mistake has arisen because of the fact that the word "master" *(malik)* appearing in the original before the words "British Imperialism" *(angrezi samraj)* was omitted in the translation in the paper book. So, wherever the word

'master' is used it means nothing else but British Imperialism As I have already pointed out we must look to the whole article and not to any particular word or phrase and reading the article as a whole, I cannot accept the Advocate General's contention that the impression created upon the reader would be that the British Government in India was the target of criticism

[9] From the extensive quotations that I have given from the article, it will be seen that the main theme of the writer was to promote a spirit of communal harmony and unity and it was with a view to develop his argument that he referred to the "floods of mutual hatred' that according to him' British Imperialism manoeuvr ed to unlock towards the young plant of Indepen dence' It is of course true that the intention of the writer is not a deciding factor for the determination of the question whether or not a writing has a particular tendency, but it is not altogether irrelevant, particularly so when the plea is that the words used do nothing more than bring out the intention that was uppermost in the writer's mind In this respect I cannot do better than quote the following passage from the judgment of Bose and Puranik JJ in A I R *1947* Nag 1[2]

'A man's speech or writings may be likely to pro duce a result the very reverse of what was intended To that extent the question of intent on is not mater al. But equally matter wh ch is patently not intended to produce a given result and is so understood by those to whom it is addressed and those who are likely to see it is less likely to produce the result than when the

environment and surround ngs wi l be l ke y to/ nad e sedition or tend to do so His own intention as ex pres ed by h s words and v ewed against the background in which they are uttered is we think, one of the attendant circumstances and so is an element which cannot be excluded from consideration '

My learned brother has taken the view that the object of the writer was laudable I respectfully agree with this conclus on and wish only to add that this object has not in any way been defeated by what the writer said in paras 2 and 3 or by a solitary reference to the "machinations of Im perialism occurring in para 14 I again repeat that we must take the article as a whole, and if one does that one will find that there can be no question of its producing any tendency to bring the Government into hatred or contempt I would conclude by making one other observa tion In judging whether a particular article offends against the law of sedition or is hit by the Press Act, we must take into consideration the surrounding circumstances As has been aptly observed by eminent Judges what was seditious fifty years ago is not so now, and the reason for this is that the country has advanced politically and even the British Government has now re cognised that Independence is the birthright of Indians Time there was when even a cry for home rule was penalised, but the conditions are quite different now This aspect of the matter was discussed at considerable length by Gwyer C J, who delivered the judgment of the Federal Court in A I R 1942 F C 22[1] Quoting Lord Sumner in 1917 A C 406, this is what his Lordship observed

The words as well as the acts which tend to en danger society differ from time to time in proport on as

because the times having changed society is stronger than before

That was a case under R 34 (6) (e) of the De fence of India Rules, the words of which were analogous to S 124 A which deals with sedition It was held

The first and most fundamental duty of every Government is the preservation of order since order is the condit on precedent to all civ l zation and the

into contempt

Later on, the learned Judge observed

'Public disorder or the reasonable antic pation or likelihood of publ c d sorder is thus the g st of the offence The acts or words complained of must either incite to disorder or must be such as to sat sfy reasona ble men that that is their intention or tendency '

This case was recently followed by a Special Bench of our Court in A I R 1946 Lah 22[4] which was a case under the Press Act Mahajan J, who wrote the principal judgment and with whom the other two learned Judges agreed observed that S 4 (1) (d), Press (Emergency Powers) Act, is substant ally in the same terms as S 124 A, Penal Code and deals with the

Court case could not be applied to a case under the Press Act, because intention was an im portant ingredient in an offence of sedition while in the case of a writing that is sought to bring within the purview of sub-s (1) of S 4 of the Press Act all that is necessary to see is whether it contains any words etc, which

followers of Mr. Jinnah, or Jinnahites and Jinnahian Leaguers as they are called therein. The learned Advocate-General tried to convince us that the attacks though apparently directed against the followers of Mr. Jinnah, were intended for the entire Muslim community and consequently they had the tendency, in the first place, to create hatred or contempt for that community and secondly to promote feelings of enmity or hatred between that community and the Hindus. I am in agreement with my learned brother that there is no force whatsoever in the first contention. Every effort is made in the article to make out that what was being criticised was the policy of, and the methods pursued by, the followers of Mr. Jinnah and that what the followers of Mr. Jinnah were doing was opposed to the teachings of Islam. This is what was said in the first article "*Punjb men Defa 144*" printed in the issue of the paper dated 29-8-1946:

"The month of Ramzan was the month of abstinence and prayers for the Muslims. The Prophet of Islam ordained them to bow their heads before God and present themselves as embodiments of humility, peace and sublime morality. They are further ordained not to oppress, tease or vex anyone and to prove themselves a blessing for all their neighbours, kinsmen and strangers. They had the instructions that if anyone abused them during the blessed days of Ramzan, they should forbear and not raise their hands.... Is it not deplorable for the believers in a religion which has preached so much tolerance and patience that during the month of Ramzan the Jinnahites of India, who claim to be the followers of Islam, should kindle the fire of mischief and disturbance, fix the day of 'Incitement' get riots committed and cause streams of blood to flow in a city like Calcutta? Can the true Muslims tolerate the existence of such bogus Jinnahian Muslims who defame Islam in the sacred month of Ramzan."

The article contained a strong plea in support of the action taken by the Punjab Government under S. 144 and these are the concluding words of it:

"We fully support the precautionary measures of the Punjab Government. It would have seriously erred if it had not imposed the said restrictions on the occasion of the *I'd* because the Jinnahian Leaguers are bent upon using the weapon of mischief and disturbance ... At any rate, we hope that by exercising their influence, right thinking and peace loving Muslims will not allow disorder to occur in any city, nor will they allow the schemes of the fanatics to materialize."

The second article headed "First put bridle in the mouths of Jinnahites" published in the issue of 31-8-1946 was obviously written with a view to condemn the writings appearing in one of the Muslim League papers and in order to make out his point, the writer started by referring to the policy of his own paper and that of papers like the 'Tribune' and the 'Statesman'. It no doubt commented upon the doings of the Jinnahites, as it described the followers of Mr. Jinnah, and it was mentioned therein that

"these Jinnahites were responsible for the great killing of Bengal, they murdered non-Muslims, picking out the Hindus particularly and made blood-dripping demonstrations of their barbarism and religious fanaticism and bigotry,"

but there was no attack upon Islam or upon the Muslim community in general. As regards that paper itself, this is what was said in the article:

"When the present Coalition Ministry was going to be formed in the Punjab this very paper openly incited the Muslim masses to murder Malik Khizar Hayat Khan. If this paper had not apologized on the display of rod of law it would have realized the consequences. If the paper which utters nothing, but abuses and inflammatory and hate spreading matter and which had several times held out threats to the people saying 'We will become Mahmud Ghaznvi. We will produce Mohammad Ghauri and Aurangzeb' is upset now at our truth telling, it should first look into its own sleeve. Where were these advise-giving papers when at Delhi Qazi Isam held out a threat to Nationalist Muslims that if they did not join the League within ten days they would be punished according to Mahammedan law?

Later on, it was mentioned:

"But when the responsibility of this 'Great Killing' fell on their shoulders and when we exposed Jinnahites in order to condemn the Nadir Shahis, Mahmud Ghaznavite and Aurangzebi mentality why did they begin to get enraged? Our position is quite clear. If they want that old memories should not be revived they must first put bridle in the mouths of Jinnahites and tell them not to mention the names of Mahmud Ghaznavi, Kasim and Aurangzeb or others in 1946."

The concluding sentence of the article was:

"If the Jinnahites realise this point peace consumig activities can at once stop in the country."

The third article was an appeal to the Nationalist Muslims, Hindus and Sikhs of the Punjab published in the issue of the paper dated 5-9-1946. It begins by pointing out that the threat of Direct Action Day of Mr. Jinnah was directed against the Hindus and Sikhs of the Punjab and the followers of Mr. Jinnah or the Jinnahi leaders, as the writer calls them, had started holding out threats in the Punjab and expressing ideas of using violence against non-Muslims. Then he referred to the speech of one of the well-known Muslim League leaders and observes:

"This simply means that by intimidating the Nationalist Muslims, Hindus and Sikhs of the Punjab, rather by placing before them the examples of Calcutta the Jinnahites are now bent upon shedding blood in torrents for Pakistan. If the I'd day and the days following passed off peacefully, it was not because the Jinnahites did not strive their utmost but because the arrangements made by the Government were adequate and very sound. What is required is that the peace loving population of the Punjab should be still more cautious. The Jinnahites will not refrain from kindling the fire of violence in the Province."

The second paragraph begins with the following words:

"It is not within our power to advise the Jinnahis. As they would not adopt the right path, it is no use trying to advise them. We, however, want to advise the

Muslim public of the Punjab not to be deceived by the ... *can bring* ... but so long ... khs in this ... "

... immed up

...

*cannot at all be conceded The right thing is the Congress formula which its Working Committee approved at Maulana Azad's motion in its meeting held at Poona "*

The last words of the article were.

...

voice "

[11] I have given these extensive quotations from the articles with two objects. The first is to show that by no stretch of language they can be taken to reflect upon the doings of the entire Muslim community and consequently they can, ...

contempt against any one, not even the followers of Mr. Jinnah or Muslim League The first article, as mentioned already, justified the action taken by the Government under S 144, the second exposed the policy of a Muslim League paper and the third appealed to the National ...

ence to my learned brother, I am unable to subscribe to the proposition that a political party can in no case be regarded as a class or section of His Majesty's subjects within the meaning of clauses (d) and (b) of sub-section (1) of S. 4. My opinion is that if a political party is well-defined and the number of persons owing allegiance to it is large enough, there is no reason why it should not be regarded as a class or at least a section of His Majesty's subjects, after all, the *underlying object* under the provisions of the Indian Press (Emergency Powers) Act was to put down and penalise the writings appearing in newspapers and journals that have the tendency to create disorder in the country either by bringing into hatred the Government established by law or by creating enmity between different sections of people and there does not appear to me to be any reason why a writing which creates serious hatred or enmity between the well defined political parties consisting of large numbers, of the nature that is likely to result in an open *conflict between them* should not be hit by the Act I, however, do not consider it necessary to go into this point in greater detail because I have come to the conclusion that the articles with which we are dealing in the present case do not have the tendency to create or promote feelings of enmity or hatred between any political bodies It must be remembered that by the very nature of things whenever a political party comes into the field, it must be prepared for criticism of its policy as well as of its programme and the mere fact that the criticism is expressed in very strong language, cannot be said to create hatred against that party. Hatred implies something *more than disapproval, dissent* or even condemnation Distinction in this respect must always be made between the criticism of a political party and that of a religious community and what might be objectionable in the case of the latter need not be so in the case of the former In each case this is a question of fact. And then, in order to be able to say whether an article has a particular tendency, we must read it as a whole and in a free and liberal spirit and it would be grossly unfair to take some sentences out of its context (*see* in this connection A I R. 1935 ALL 869[1]) If we apply this standard in the present case, it will be clear that each one of the *articles confines*, *itself to the respective objects* with which they were written and attention of the readers is attracted to them rather than to the criticism of the League and other subjects that are merely referred to in order to develop the particular theme *that* the writer has in mind Consequently I hold that none of them is hit by S 4 of the Act

[12] **Bhandari J** —I concur in the order proposed.

[13] I regret I am unable to endorse the proposition that a political party, however large its following, can be regarded as a class or section of His Majesty's subjects or that an attack on a political party or its leaders however severe in its terms can in no circumstances bring the publication within the mischief of the Indian Press Act. As pointed out in my order in *the matter of the Daily Zamindar* (Criminal Original No 20 of 1940) a ... tion cannot fall within ...

sion "class or section" and a criticism of the organisation or its leaders cannot attract the provisions of clauses (d) or (h) unless the article read as a whole has the tendency of producing or promoting class hatred. If that tendency is clearly discernible, the article must be deemed to contain words of the nature described in sub-section (1) of S. 4 notwithstanding the fact that outwardly the article purports to be nothing more than the criticism of a school of political opinion. While a political party may be freely criticised or even ridiculed, it is not open to a newspaper in this country to make any comments which have the tendency of promoting or accentuating communal bitterness.

[14] I agree with my learned brother Teja Singh J., that the articles to which objection has been taken do not bring the Muslim community into hatred or contempt and do not promote feelings of enmity or hatred between different classes of His Majesty's subjects.

D.H. *Petition accepted.*

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**A. I. R. (34) 1947 Lahore 372** *[C. N. 91.]*

**FULL BENCH**

ABDUL RASHID C. J., MAHAJAN AND ACHHRU RAM JJ.

*Satish Narain and another—Plaintiffs—Appellants v. L. Deoki Nandan and others—Defendants — Respondents.*

First Appeal No. 239 of 1944, Decided on 3-4-1947, referred by Ram Lall and Achhru Ram JJ:

(a) Hindu Law—Partition—Son's right to enforce partition during father's life-time — Punjab rule — Custom (Punjab).

There is no bar in the Punjab to a son enforcing partition of the joint family property during his father's life-time against his uncles or other coparceners where the father supports his claim to partition: *Case law discussed.* [Para 19]

(b) Custom — Custom cannot be extended by process of logical reasoning. [Para 17]

*Cases referred:—*

1. ('79) 78 P. R. 1879, Mt. Thakuri v. Ganda Mal.
2. ('75-77) 1 All. 77, *Baldeo Das* v. *Sham Lal.*
3. ('86) 113 P. R. 1886, Nathu Rai v. Mannu Ram.
4. ('88) 109 P. R. 1888, Kahan Chand v. Sarb Dial.
5. ('91) 112 P. R. 1891, Fatteh Singh v. Hari.
6. ('95) 105 P. R. 1895, Raja Ram v. Hansraj.
7. ('13) 5 P. R. 1913 : 19 I. C. 11, Tulsi Ram v. Shib Das.
8. ('17) 105 P. R. 1917 : 5 A. I. R. 1918 Lah. 291 : 43 I. C. 667 (F. B.), Hari Kishen v. Chandu Lal.

*F. C. Mital and Madan Mohan Lal*—for Appellants.
*J. L. Kapur, Prem Chand Pandit and Parkash Chandar*—for Respondents.

**Achhru Ram J.**—This reference has arisen out of a suit brought by Satish Narain, adopted son of one Joti Parshad, an Aggarwal of Hissar, and by Bishan Sarup, the subsequently born natural son of the said Joti Parshad, against Devki Nandan, the natural father of Satish Narain plaintiff and the real brother of Joti Parshad, Mt. Bhagwati and Mt. Sonheri, the widows of Dwarka Parshad and Ghansham Das, his deceased brothers, and Joti Parshad himself for partition of the property of the joint Hindu family.

[2] Mul Chand, the father of Joti Parshad and others, died in December 1939. The suit for partition was instituted on 12-11-1943 originally by Satish Narain alone. Bishan Sarup was born on 20-1-1944 during the pendency of the suit and was added as a co-plaintiff at some time after that. The suit was resisted by Devki Nandan defendant alone. All other defendants supported the plaintiffs' claim and at a later stage of the proceedings in the trial Court Joti Parshad defendant even applied to be transposed to the side of the plaintiffs but the learned trial Judge did not see his way to accede to this request of his. One of the pleas raised by Devki Nandan was that during the life-time of Joti Parshad the plaintiff had no right to sue for partition of the joint family property. On this plea the following preliminary issue was framed :

"Have the plaintiffs a *locus standi* to sue for partition during the life-time of their father?"

[3] Deciding this issue against the plaintiffs the learned Subordinate Judge dismissed their suit. A first appeal filed by the plaintiff from the decree of the learned Subordinate Judge dismissing their suit was heard by a Division Bench consisting of myself and my brother D. Ram Lall. We referred the following two questions to a Full Bench :

"(1) Whether in the absence of proof of custom to the contrary in the case of a Hindu family governed generally by the Mitakshara a son cannot enforce partition of joint family property during his father's life-time ?

(2) If the answer to the first question be in the negative, whether a son cannot enforce partition of the joint family property against his uncles or other coparceners even though the father supports his claim to partition?"

[4] Inasmuch as after hearing the learned counsel for the parties on the second question we reached the conclusion that the aforesaid question should be answered in the negative (affirmative ?) and inasmuch as we were of the opinion that our answer to that question was sufficient for the disposal of the present appeal we did not consider it necessary to hear the counsel on the first question or to give any decision regarding it.

[5] The earliest reported case in which the Chief Court felt called upon to express an opinion as to the competency of a Hindu son to maintain a suit for partition of the joint family property during the life-time of his father was 78 P. R. 1879.[1] In that case the suit had been

brought by a Hindu Tarkhan for possession of an ancestral house alienated by his father who was still alive on the allegation that the sale being without necessity was not binding on him The sale was held to be only partially for neces sity and the Bench hearing the appeal in the Chief Court had to decide whether the plaintiff could be granted a decree for possession of the house during his father s life time or could be granted only a declaratory decree They decided against decreeing possession in his favour while the father was alive and rested this decision on the ground that in the Punjab a Hindu son was not entitled to compel his father to make a partition of the ancestral estate In dealing with this matter, Smyth J who wrote the main judgment made the following observations at p 218 :

'It remains only to consider the form of the decree to be given in plaintiff s favour Seeing that if no sale had taken place plaintiff would not have been entitled

Plowden J who added a short note expressing his concurrence observed as follows

Bombay view of the law accords with the custom stated in the Panjab Code "

[6] It will appear from the above observations that what a Hindu son in the Punjab could not, according to the learned Judges, do was to compel a partition against the father These observations cannot be taken to debar a son from suing for partition of the joint family property with the concurrence of the father. The relevant passage in the Punjab Civil Code, S 9, para 7, relied on by Smyth J reads as follows

mode of doing so "

[7] The relevant passage in Cowell's Treatise on Hindu Law referred to by Plowden J runs as follows

"The Supreme Court of Bombay, however, in a suit brought by a son against his father and brothers for partition held that the right of compulsory partition if it exists at all, does not extend to immovable property. 'The highest authority, they said, 'recognised in Hindu Law hold, as between a father and his sons in the dis tribution of paternal or other ancestral estate, the

certain contingencies

[8] Neither of the above texts can be regarded as an authority for the view that the existence of the father is a bar to the Hindu son s suit for partition of joint family estate even where his claim to such partition is supported by the father

[9] The next case in which the Chief Court dealt with the subject of a Hindu son's right to call for partition of joint family property was 113 P R 1886 [3] The question which directly arose in that case was that of the liability of a son's undivided interest in the joint family property to sale, while his father was still alive, in execu tion of a money decree against him The learned Judges who heard the appeal were of the opinion that the son's interest could not, under the circumstances, be seized and sold in execution of the decree unless the son could be shown to have a right to compel partition of his share during his father's life time Holding that he had not been shown to possess such a right they declared his undivided interest not be so liable This case can also not be regarded as an authority for the proposition that even with the father's con sent and support a son cannot maintain a suit for partition of the joint family estate

[10] I may note that the view as to the non liability of the son's interest in the joint family property to seizure and sale in execution of a decree against him during the father's life time does no longer hold good and has been expressly dissented from in subsequent decisions of this Court.

case was between a purchaser of a joint family house from the father and a judgment creditor of the son who, while the father was yet alive, sought to enforce the payment of his decretal debt by the attachment and sale of the son's alleged interest in the house in spite of the same having been sold by the father, impugning the sale as in excess of the father's power in so far

of the claim of the son's judgment creditor, the learned Judges also held that the son's interest in the house was otherwise also not liable to attachment or sale because among the Brahmans of the City of Lahore (the judgment debtor and

his father were Brahmans of Lahore) the doctrine of Mitakshara as to a son's competency to enforce the partition of joint property against the father had either been never popularly known or acted upon or had long fallen into disuse and oblivion. The observations made by me in regard to the decision in 113 P. R. 1886[4] apply also to the dicta of the learned Judges in this case.

[12] In 112 P. R. 1891[5] the minor sons of a Bairagi Sadhu who successfully sued to set aside a sale of some ancestral property by their father were granted by the Courts below a decree for possession of such property though the father was still alive. In the Chief Court, the decree for possession was converted into one for declaration on the same grounds as found favour with the learned Judges who had decided 78 P. R. 1879.[1] The following were the observations made with regard to the right of a Hindu son in the matter of partition of joint family property and its implications to his right to sue for possession of property wrongfully alienated by the father during the latter's lifetime:

"It has been found (even among the higher castes of Hindus in the Punjab) that a son cannot compel a partition of the ancestral property during his father's life-time and if this principle is correct it appears to us to cut away the only possible foundation for the argument that a claim for possession will lie, though the alienor is still living."

[13] In 105 P. R. 1895[6] the parties to which were Hindu Rajputs of Naraingrah tahsil in the Ambala district who lived on agriculture were held to be governed by agricultural custom. The case having been decided on the basis of such custom and with special reference to the entries in the Riwaj-i-am of the Tahsil can furnish no guidance in a case arising under Hindu law. However, it is noticeable that even in this case only the right of the sons to enforce partition against their father's will was negatived and it was not held that the sons could not claim partition even with the father's concurrence.

[14] In 5 P. R. 1913[7] the sons of one Shiv Das, an Arora of Sialkot district, sued their father for partition of ancestral land. Their claim to partition was very stoutly resisted by Shiv Das and they were held to have no right to enforce partition against him.

[15] In 105 P. R. 1917[8] one of the sons of a Khatri, resident of a Amritsar, brought a suit for possession of his one-fifth share by partition against his father, brothers and mother who all joined in contesting the suit. The trial Court dismissed the suit on the ground that in the Punjab, in the absence of a custom to the contrary, a Hindu son could not enforce partition of joint family property during his father's life-time and against his will. On appeal to the Chief Court, the matter was referred to a Full Bench which affirmed the decision of the learned trial Judge and held that in the Punjab a son seeking to enforce partition of the joint family estate against his father could do so only if he could prove a special custom to that effect.

[16] It will be noticed that in all these cases the only question which arose for decision, or on which it was otherwise considered necessary to express an opinion, was whether the son could compel partition against the will of the father. Our attention was not drawn by the learned counsel for the respondents to any decided case in which the right of a son to sue, during his father's life-time, for partition of the joint family estate with the concurrence or support of the father may have been negatived, or in which co-parceners other than the father may have successfully resisted such a suit on the ground of the plaintiff's want of locus standi to sue, in spite of the father having actually supported the claim.

[17] Whatever ground there may be for denying to a son in a Mitakshara family in the Punjab the right to compel partition of the joint family estate against the father, it cannot be taken to justify the denial to him of the right to claim partition against other coparceners where the father does not oppose his claim. It is well settled that custom cannot be extended by a process of logical reasoning. Even if the view taken in the Full Bench decision in 105 P. R. 1917[8] as to a custom having either always existed or, due to the peculiar conditions prevailing there, as to such a custom having grown up in the Punjab, disentitling a Hindu son in a Mitakshara joint family, quite contrary to the well recognised rule of the Mitakshara, to compel partition of the joint family estate during his father's life-time and against his will be assumed to be correct, there can be no justification at all for extending the custom so as to cover cases where the son does not claim partition against the father's will and where his claim to partition is in fact supported by the father.

[18] In suits for partition defendants who support the plaintiff's claim to partition are virtually in the same position as the plaintiff himself and they or any one or more of them can ask for the separation of his or their share or shares in the joint estate without being actually transposed to the side of the plaintiff. The suit for partition brought by the son in which the father as defendant supports the plaintiff may therefore be regarded for all practical purposes as a suit by the father himself even without his becoming a co-plaintiff.

[19] For the reasons given above, quite regardless of the answer that might be returned to the first question, I would answer the second

his uncles or other coparceners where the father supports his claim to partition

**Abdul Rashid C J.**—I agree

**Mahajan J** —I agree

V R B *Answer accordingly*

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**A. I. R (34) 1947 Lahore 375** *[C N 92]*

CORNELIUS AND FALSHAW JJ

*Mohd Rafi — Convict — Appellant* v *Emperor.*

Criminal Appeal No 160 of 1947, Decided on 17 4 1947, from order of Addl Sessions Judge Amritsar D/ 21 1 1947

Penal Code (1860) Ss 102 and 105 — Commencement of right of private defence of body and property—Distinction

Although both in the case of the right of private defence of property and that of the right of private defence of the body the right commences when there is

so imminent as to amount to an attempt to commit the offence [Para 6]

A party of persons including the deceased armed

*J G Sethi and B L Kohli*—for Appellant

*S Kartar Singh Chawla (A L R.) and Madan Mohan for Advocated General*—for the Crown

**Falshaw J** — Mohammad Rafi, appellant has appealed against his conviction under S 302, Penal Code, by the Additional Sessions Judge, Amritsar, and sentence of transportation for life

[2] It is not in dispute that sometime soon after 5 30 P M on 29 8 1946 Mohammad Rafi appellant shot Ibrahim deceased dead with a shot gun at close range in the lane outside his house at Attari, and the only question for decision is whether his action in shooting the deceased was justified as having been done in exercise of the right of defence of person and property

[3] Up to a point the facts are not really in dispute The accused is a Kashmiri Butt by caste as is Ghulam Mohammad P W. 7 the brother of Ibrahim deceased, and relations between these brothers and the family of the accused had become strained quite a long time ago because Ghulam Mohammad and Ibrahim had not been invited to a certain marriage, and this had led, according to Ghulam Mohammad, to a partial boycott of the family of the accused by other persons of the brotherhood Moreover about two years before the occurrence, a bicycle belonging to Sheikh Ghulam Mohammad, P W 10 was alleged to have been stolen and the bicyle in question was recovered from the possession of Mohammad Rafi accused A report of the theft was first made to the police but the police took no action in the matter and a private complaint was filed on the basis of which Mohammad Rafi was prosecuted along with a man named Dial Singh but Mohammad Rafi was discharged and Dial Singh was acquitted The police also instituted a case under S 182, Penal Code against Sheikh Ghulam Mohammad and this was pending at the time of the present occurrence Sheikh Allaha Rakha P W 9 is the brother of Sheikh Ghulam Mohammad and the connection between these two brothers and the deceased and his brother appears to be that Sheikh Ghulam Mohammad had taken advantage of the estrangement between the family of the accused and the deceased and his brother to obtain witnesses in support of his theft case from their party, it being admitted by Ghulam Mohammad P W 7 that a brother and a cousin of his had appeared as witnesses in the case The matter of the bicycle itself had apparently been settled as Sheikh Ghulam Mohammad brought a civil suit against Mohammad Rafi and Dial Singh in which as shown by the certified copy Ex P F a consent decree for possession of the bicycle was passed on 14 11 1945, but the ill-feeling between the parties was still very much alive at the time of the occurrence owing to the pendency of the case under S 82 Penal Code

[4] On the evening of the occurrence about half an hour before it actually took place according to Allah Rakha P W 9, Allah Rakha who is apparently a man of some position in Attari being an assessor and the proprietor of a small lime factory, was standing in front of his factory when a tonga went past in which Mohammad Rafi accused, his brother Shafi, Rahman a cousin of Ibrahim deceased and another man named Allaha Baksh were sitting, and as they were passing Mohammad Rafi and Rahman shouted some abuse at Allah Rakha which apparently caused great offence to him It is from this point onwards that the version of the prosecution and defence differ The prosecution story is that about a quarter of an ab

his father were Brahmans of Lahore) the doctrine of Mitakshara as to a son's competency to enforce the partition of joint property against the father had either been never popularly known or acted upon or had long fallen into disuse and oblivion. The observations made by me in regard to the decision in 113 P. R. 1886[4] apply also to the dicta of the learned Judges in this case.

[12] In 112 P. R. 1894[5] the minor sons of a Bairagi Sadhu who successfully sued to set aside a sale of some ancestral property by their father were granted by the Courts below a decree for possession of such property though the father was still alive. In the Chief Court, the decree for possession was converted into one for declaration on the same grounds as found favour with the learned Judges who had decided 78 P. R. 1879.[3] The following were the observations made with regard to the right of a Hindu son in the matter of partition of joint family property and its implications to his right to sue for possession of property wrongfully alienated by the father during the latter's lifetime:

> "It has been found (even among the higher castes of Hindus in the Punjab) that a son cannot compel a partition of the ancestral property during his father's lifetime and if this principle is correct it appears to us to cut away the only possible foundation for the argument that a claim for possession will lie, though the alienor is still living."

[13] In 105 P. R. 1897[6] the parties to which were Hindu Rajputs of Naraingrah tahsil in the Ambala district who lived on agriculture were held to be governed by agricultural custom. The case having been decided on the basis of such custom and with special reference to the entries in the Riwaj-i-am of the Tahsil can furnish no guidance in a case arising under Hindu law. However, it is noticeable that even in this case only the right of the sons to enforce partition against their father's will was negatived and it was not held that the sons could not claim partition even with the father's concurrence.

[14] In 5 P. R. 1918[7] the sons of one Shiv Das, an Arora of Sialkot district, sued their father for partition of ancestral land. Their claim to partition was very stoutly resisted by Shiv Das and they were held to have no right to enforce partition against him.

[15] In 105 P. R. 1917[8] one of the sons of a Khatri, resident of a Amritsar, brought a suit for possession of his one-fifth share by partition against his father, brothers and mother who all joined in contesting the suit. The trial Court dismissed the suit on the ground that in the Punjab, in the absence of a custom to the contrary, a Hindu son could not enforce partition of joint family property during his father's lifetime and against his will. On appeal to the Chief Court, the matter was referred to a Full Bench which affirmed the decision of the learned trial Judge and held that in the Punjab a son seeking to enforce partition of the joint family estate against his father could do so only if he could prove a special custom to that effect.

[16] It will be noticed that in all these cases the only question which arose for decision, or on which it was otherwise considered necessary to express an opinion, was whether the son could compel partition against the will of the father. Our attention was not drawn by the learned counsel for the respondents to any decided case in which the right of a son to sue, during his father's life-time, for partition of the joint family estate with the concurrence or support of the father may have been negatived, or in which co-parceners other than the father may have successfully resisted such a suit on the ground of the plaintiff's want of *locus standi* to sue, in spite of the father having actually supported the claim.

[17] Whatever ground there may be for denying to a son in a Mitakshara family in the Punjab the right to compel partition of the joint family estate against the father, it cannot be taken to justify the denial to him of the right to claim partition against other coparceners where the father does not oppose his claim. It is well settled that custom cannot be extended by a process of logical reasoning. Even if the view taken in the Full Bench decision in 105 P. R. 1917[8] as to a custom having either always existed or, due to the peculiar conditions prevailing there, as to such a custom having grown up in the Punjab, disentitling a Hindu son in a Mitakshara joint family, quite contrary to the well recognised rule of the Mitakshara, to compel partition of the joint family estate during his father's life-time and against his will be assumed to be correct, there can be no justification at all for extending the custom so as to cover cases where the son does not claim partition against the father's will and where his claim to partition is in fact supported by the father.

[18] In suits for partition defendants who support the plaintiff's claim to partition are virtually in the same position as the plaintiff himself and they or any one or more of them can ask for the separation of his or their share or shares in the joint estate without being actually transposed to the side of the plaintiff. The suit for partition brought by the son in which the father as defendant supports the plaintiff may therefore be regarded for all practical purposes as a suit by the father himself even without his becoming a co-plaintiff.

[19] For the reasons given above, quite regardless of the answer that might be returned to the first question, I would answer the second

question in the affirmative and would hold that there is no bar in the Punjab to a son enforcing partition of the joint family property against his uncles or other coparceners where the father supports his claim to partition

**Abdul Rashid C. J.**—I agree

**Mahajan J.**—I agree

V R B *Answer accordingly*

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**A. I. R. (34) 1947 Lahore 375 [C N 92]**

CORNELIUS AND FALSHAW JJ.

*Mohd Rafi — Convict — Appellant* v. *Emperor.*

Criminal Appeal No 160 of 1947, Decided on 17 4-1947, from order of Addl Sessions Judge, Amritsar, D/ 21 1-1947.

*Penal Code (1860), Ss. 102 and 105* — Commencement of right of private defence of body and property—Distinction.

Although both in the case of the right of private defence of property and that of the right of private ...

so imminent as to amount to an attempt to commit the offence [Para 6]

A party of persons including the deceased armed ...

house shot and fatally wounded the deceased at a distance of about 11 to 14 feet while he was advancing towards him :

... the accused was ... of private defence ... exceed the right [Paras 6, 7]

*J G Sethi and R L Kohli*—for Appellant

*S Kartar Singh Chawla (A L R.) and Madan Mohan for Advocated General*—for the Crown

**Falshaw J** — Mohammad Rafi, appellant has appealed against his conviction under S 302, Penal Code, by the Additional Sessions Judge, Amritsar, and sentence of transportation for life

[2] It is not in dispute that sometime soon after 5 30 P M. on 29 8 1946 Mohammad Rafi appellant shot Ibrahim deceased dead with a shot gun at close range in the lane outside his house at Attari, and the only question for decision is whether his action in shooting the deceased was justified as having been done in exercise of the right of defence of person and property.

[3] Up to a point, the facts are not really in dispute The accused is a Kashmiri Butt by caste as is Ghulam Mohammad P.W. 7 the brother of Ibrahim deceased, and relations between these brothers and the family of the accused had become strained quite a long time ago because Ghulam Mohammad and Ibrahim had not been invited to a certain marriage, and this had led, according to Ghulam Mohammad, to a partial boycott of the family of the accused by other persons of the brotherhood Moreover, about two years before the occurrence, a bicycle belonging to Sheikh Ghulam Mohammad, P W 10 was alleged to have been stolen and the bicyle in question was recovered from the possession of Mohammad Rafi accused. A report of the theft was first made to the police but the police took no action in the matter and a private complaint was filed on the basis of which Mohammad Rafi was prosecuted along with a man named Dial Singh but Mohammad Rafi was discharged and Dial Singh was acquitted. The police also instituted a case under S. 182, Penal Code against Sheikh Ghulam Mohammad and this was pending at the time of the present occurrence Sheikh Allaha Rakha P W 9 is the brother of Sheikh Ghulam Mohammad and the connection between these two brothers and the deceased and his brother appears to be that Sheikh Ghulam Mohammad had taken advantage of the estrangement between the family of the accused and the deceased and his brother to obtain witnesses in support of his theft case from their party, it being admitted by Ghulam Mohammad P. W. 7 that a brother and a cousin of his had appeared as witnesses in the case The matter of the bicycle itself had apparently been settled as Sheikh Ghulam Mohammad brought a civil suit against Mohammad Rafi and Dial Singh in which as shown by the certified copy Ex P P a consent decree for possession of the bicycle was passed on 14 11 1945, but the ill feeling between the parties was still very much alive at the time of the occurrence owing to the pendency of the case under S 182, Penal Code

[4] On the evening of the occurrence about half an hour before it actually took place according to Allah Rakha P. W. 9, Allah Rakha who is apparently a man of some position in Attari, being an assessor and the proprietor of a small lime factory, was standing in front of his factory when a tonga went past in which Mohammad Rafi accused, his brother Shafi, Rahman a cousin of Ibrahim deceased and another man named Allaha Baksh were sitting, and as they were passing Mohammad Rafi and Rahman shouted some abuse at Allah Rakha which apparently caused great offence to him. It is from this point onwards that the version of the prosecution and defence differ. The prosecution story is that about a quarter of an hour ... Rakha

went to the shop of Mehraj Din P. W. 11 where he found Mehraj Din present along with Ghulam Mohammad P. W. 7, Ibrahim deceased and Sheikh Mohammad P. W. 10. Allah Rakha complained to Ibrahim that his cousin Rahman had joined with Mohammad Rafi in abusing him and on the suggestion of Ibrahim that they should go and protest to Ghulam Rasul, the father of Mohammad Rafi accused all five of them set off for the house of Ghulam Rasul. When they reached the corner of the lane in which the house is situated they saw Mohammad Rafi accused and Rahman coming towards them. Ibrahim caught hold of Rahman and slapped him, asking him why on such a sacred day (it was the day of Id-ul-Fitar) he had joined with wicked people like the accused and behaved objectionably. On this Mahammad Rafi ran back into his house and came out with the gun Ex. P. 1 and shot Ibrahim in the chest with it. After that, Mohammad Rafi ran back into his house and fastened the door and remained inside until after the police had arrived. This was only about two hours later as immediately after the occurrence Ghulam Mohammad P. W. 7 and Allah Rakha went to the police station at Gharind only four miles away along the Grand Trunk Road where the report of Ghulam Mohammad was recorded at 7 P. M. and Sub-Inspector Charan Singh promptly proceeded to the spot.

[5] As against this, the version of the accused was that seven persons including Ibrahim deceased and Allah Rakha and his brother Ghulam Mohammad of the prosecution witnesses and four other men named Shaukat Ali son of Ghulam Mohammad, Taj Din, Mohammad Din and Kaka, who are not witnesses, came to his house where he was present with his brother Mohammad Shafi and Rahman. All of them were armed, Ghulam Mohammad P. W. 7 having a Kandhali, Shaukat Ali and Taj Din hatchets, Ibrahim a khunda, Mohammad Din and Kaka sticks and Allah Rakha a sword, and all of them were shouting abuse and challanges. They did not stop although Mohammad Rafi and his brother Mohammad Shafi went out and appealed to them to cease. On this Mohammad Rafi went into his baithak which opens directly on the street and brought out a gun. In spite of this they kept on advancing and Ibrahim was bent on striking him with the object of preventing him from shooting. Mohammad Rafi fired the gun without aiming at any particular person but hitting Ibrahim as he was afraid of being beaten himself and also afraid that his wife and mother who were inside his house might be dishonoured. After firing the gun he ran inside the house as did Mohammad Shafi and Rahman who had also apparently come out and the doors were closed, but some blows were struck on the door with some weapon by one or more of the persons outside. (After discussing the evidence his Lordship concluded that the object of the party which went to the house of the accused was not peaceful and that weapons were taken which presumably were intended to be used and proceeded.)

[6] The question which then arises is whether the accused has in shooting Ibrahim exceeded any right which he may have enjoyed under Ss. 100 and 103, Penal Code which lay down the circumstances in which death may be voluntarily caused in the exercise of the right of defence of the body and of property respectively. Section 103 provides that the right of defence of property extends to the voluntary causing of death if the offence, the committing of which or the attempting to commit which, occasions the exercise of the right is robbery, house-breaking by night, mischief by fire committed on any building used as a human dwelling or theft, mischief or house-breaking under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised. The defence witnesses have alleged that the members of the complainant party were shouting that they intended to kill Mohammad Rafi and also that they intended to set fire to his house, which would be covered by the third of the above offences. It would not appear, however, that the stage at which the accused was entitled to exercise any right he may have enjoyed under S. 103 had yet been reached, since the law on this subject draws a distinction between defence of the person and defence of property. Section 102 provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed, whereas the words used are different in S. 105 which deals with the commencement of the right of defence of property and reads: "The right of private defence of property commences when a reasonable apprehension of danger to the property commences." Similarly there is a difference in the wording of Ss. 100 and 103. The relevant portion of S. 100 reads: "If the offence which occasions the exercise of the right be of any of the description hereinafter enumerated" while the relevant portion of S. 103 reads: "If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right." From this it would appear that although in both cases (the right commences when there is a reasonable apprehension of harm, the circumstances under which there can

be said to be a reasonable apprehension differ, a mere threat being sufficient in the case of an attack on the person, whereas in the case of an attack on property there must be something more than a mere threat and it must be a threat which is so imminent as to amount to an attempt to commit the offence In the circumstances of the present case, it would seem that even if the allegation of the accused and his witnesses that Ibrahim and his party were uttering threats of setting fire to his house is true, there is no evidence that any members of the party had made preparations to carry out this threat in the form of carrying torches or inflammable material, or that any attempt of any kind was made, and therefore the threat had not become so imminent that the accused was entitled to shoot in order to repel it

[7] The question which remains is whether there was a reasonable apprehension that he or any of the persons in the house might suffer grievous hurt at the hands of Ibrahim and his companions To determine this point some reference is necessary to the evidence regarding the relative positions of the accused and Ibrahim when the fatal shot was fired The plan shows that the distance from the main door of the house of the accused to the corner of the lane in which the house is situated is 47 feet and the spot marked A where bloodstains were found by the Sub Inspector is 15 feet from the entrance of the lane and 32 feet from the door of the accused's house Both defence and prosecution witnesses are agreed on the point that when the shot was fired the accused and the deceased were 2 or $2\frac{1}{2}$ karams i e, 11 to 14 feet apart, and this is in accordance with the medical evidence, according to which there was a main gunshot wound on the chest of the deceased measuring $2'' \times 1\frac{1}{4}''$ surrounded by 27 separate wounds caused by pellets which had penetrated the chest covering altogether an area $4'' \times 2''$. The gun appears to have been an ordinary 12 bore shotgun of British manufacture and the cartridge used was of American manufacture, thus ensuring more or less standard conditions and at p 279 of Glaister's Medical Jurisprudence and Toxicology the following passage occurs

"When the gun has been fired from about 1 to 3 feet from the body, a more or less irregularly circular wound about $1\frac{1}{2}$ inches in diameter will be produced There will be evidence of some degree of scorching, carbon deposit and tattooing So far as dispersion is concerned, with a 'half choke gun the pellets will show a spread of about 5 inches in diameter at a range of 5 yards, about 12 inches in diameter at 10 yards, about 15 inches in diameter at 15 yards, and about 20 inches in diameter at 20 yards"

There is no evidence of any scorching, carbon deposit or tattooing in the present case, and from the medical evidence it would thus appear that the shot was fired from about 4 yards range, which is in agreement with the statements of the witnesses There is some doubt as to whether the point marked A on the plan was the exact spot at which the deceased was standing when the shot was fired On this point, the prosecution witnesses appear to have changed their story to a certain extent with a view to removing the spot as far as possible from the house of the accused by stating that when he was shot Ibrahim merely sat down then and there, whereas previously they had stated that he had fallen down and the defence witnesses have stated that actually he reeled back a step or two before falling, which seems to be quite possible If the place at wich he was standing when he was shot was 5 feet nearer the door of the house of the accused and the shot was fired from a distance of 12 feet, the accused at the time must have been standing opposite the door of his *baithak* at a distance of about 15 feet from the main door of his house and the fact that Ibrahim received the shot on the front of his body instead of on the side or the back supports the story of the defence that he was actually advancing towards the accused in a threatening manner when he was shot, and it seems impossible that he [illegible] -cumstances [illegible] ed five, as [illegible] ven, as the defence alleges, it is almost certain that some of them at any rate were armed with deadly weapons and their advance in a threatening manner must undoubtedly be held to have given rise in the mind of the accused to a reasonable apprehension that he was about to sustain grievous injury at their hands, and it must accordingly be held that in firing his gun so as to cause fatal injuries to Ibrahim he did not exceed the right of defence of the body which he enjoyed according to law and I would accordingly accept the appeal and acquit him

**Cornelius J.**—I agree

V B B *Appeal allowed*

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**A I R (34) 1947 Lahore 377** *[C. N 93]*

CORNELIUS AND FALSHAW JJ.

*Hashmat s/o Umre Khan and another — Convicts—Appellants v. Emperor*

Criminal Appeal No. 999 of 1946 Decided on 2- 3-1947, from order of Sessions Judge, Ludhiana, D/- 11 11 1946

A. I. R. (34) 1947 Lahore 380 [C. N. 95.]

CORNELIUS AND FALSHAW JJ.

*Jiwana s/o Mohd. and another — Convicts — Appellants v. Emperor.*

Criminal Appeals Nos. 1004, 1087 and 1092 of 1946, Decided on 31-3-1947, from order of Sessions Judge, Lyallpur at Jhang, D/-20-11-1946.

Cattle Trespass Act (1871), S. 10 — "Cattle trespassing on such land." meaning of — Cattle trespassing doing damage — Capture of cattle at very long distance and near their shade, if covered by S. 10 — Owner of animal using force to prevent seizure, if protected under S. 104, Penal Code — Penal Code (1860), 104.

In order to cover the act of the owner or occupier of a field who pursues a trespassing animal and captures it outside the field which has been damaged, the words "cattle trespassing on such land" in S. 10 have to be given an extended meaning and such an extension must be confined within reasonable limits. The act of seizure may be within section if it is effected at a spot within easy reach of the field damaged, but where the distance is very great, and the cattle have already come not merely constructively but actually within their owner's possession the act of the pursuers in seizing and attempting to remove the animals, is not only not covered by S. 10, Cattle Trespass Act, but it also amounts technically to an offence of theft within the meaning of S. 378, Penal Code. Consequently, the owners of the animals are entitled under S. 104, Penal Code to use force to any extent short of causing death in order to prevent the pursuers from carrying out their purpose. [Para 7]

*Cases referred :—*

1. ('91) 4 P. R. Cr. 1891, Hadu v. Queen-Empress.
2. ('29) 116 I. C. 465 : 15 A. I. R. 1928 Lah. 692, Waryami v. Emperor.
3. ('35) 153 I. C. 427 : 21 A. I. R. 1934 Nag. 258 : 31 N. L. R. 189, Jagannath Singh v. Emperor.

*A. N. Chona* — for Appellants.

*S. Kartar Singh Chawla and Banerjee for Advocate-General, Punjab* — for the Crown.

**Cornelius J.** — This judgment will dispose of three criminal appeals, viz., No. 1004 of 1946 by Jiwana and Fauja, No. 1087 of 1946 by Sikandar and No. 1092 of 1946 by Dara. The four appellants were jointly tried by the Sessions Judge of Lyallpur on a charge under S. 302 read with S. 34, Penal Code, for the murder of one Mammu a Bloch of their village. Mammu died as a result of blows struck with a blunt weapon and with a penetrating weapon such as a spear. He had a contused wound on the head under which the skull was fractured, as well as two other blunt-weapon injuries on the left forearm and the right shoulder. There were two spear wounds, on the back and the left thigh respectively, the former of which had cut the peritoneum and the large intestine and this had directly led to Mammu's death. The prosecution case is that the spear was used by Jiwana, and the blunt weapon blows were given by Fauja, Sikandar and Dara. Two brothers of the deceased namely Amir and Shamir also sustained injuries in the same occurrence. Amir had a contusion on his left elbow and a vague injury on his left hip while Shamir had a contusion on his right arm. It is said that Amir's injuries were caused by Fauja and that Shamir was beaten by Dara. Holding that there was a sudden and unpremeditated attack by the accused, the learned Sessions Judge found Jiwana guilty under S. 302, Penal Code, and sentenced him to transportation for life. He held Fauja to be guilty under S. 325, Penal Code, and awarded him five years' rigorous imprisonment, while Dara and Sikandar were held guilty of causing simple hurt to Mammu and were sentenced to undergo nine months' rigorous imprisonment each.

[2] The prosecution case is a simple one. The family of the deceased have a cotton field some six hundred *karams* away from the scene of the occurrence, and on the afternoon of the day in question, two camels belonging to the family of the accused persons trespassed into this cotton field and caused damage. On a previous occasion, when damage had been caused by these animals, the owners had been warned that the next time a fine would be levied, and it seems that on this occasion, Mammu and his brothers Amir and Shamir decided to catch the animals, which ran off in the direction of their master's *bhaini*, pursued by the three men. Mammu and his brothers are alleged to have caught the animals at a distance of about 20 *karams* from the *bhaini*, on land which belongs to the family of the accused persons. The four accused persons then appeared and it is said that Dara cried out to the others that Mammu who had been troubling them over these animals should not be allowed to go alive, and immediately upon coming up, Jiwana delivered a spear blow which penetrated Mammu's left thigh, and he fell down whereupon Fauja, Sikandar and Dara gave him *lathi* blows, that of Fauja landing on his head and then Jiwana speared him again. Amir and Shamir were also belaboured by Fauja and Dara respectively. One Gahna appeared while the assault was in progress and stopped the attack. The occurrence was said to have taken place at sunset on 28-6-1946, and the case as reported at 10 P.M. by Mitha, paternal uncle of Mammu at the *thana* only two miles away was as outlined above with the exception that Sikandar and Dara were not mentioned there as having hit Mammu. A dying declaration by Mammu was recorded by Sub-Inspector Saleh Mohammad (P. W. 15) at about 11 P. M. the same night. In this the assailants of Mammu were mentioned as Jiwana, Fauja and Sikandar. The assailants of Amir and Shamir were not specified in the first information report, but in

the dying declaration it is stated that all the four accused persons belaboured Amir and *Shamir with sotas*

[3] The four accused persons were arrested on 29th June and Jiwana and Fauja were found to have injuries on their persons Jiwana had a contused wound 2" in length on the head, a contusion on the left arm, another on the right *shoulder and a bruise on the left buttock* Fauza had a contused wound $\frac{3}{4}" \times \frac{3}{4}"$ on the head as well as a bruise on the left thigh There is no mention of any injuries caused to the accused persons in either the first information report or the dying declaration The three eye witnesses *Amir (P W 4), Shamir (P W 5) and Gahna* (P W 6) have admitted that the injuries of Jiwana and Fauja were caused in the same incident as their own, and it seems that Amir hit Fauja while Shamir hit Jiwana, but it does not appear that Mammu had any weapon or *that he struck anyone He was apparently* brought down before Amir and Shamir were attacked Taking a tally of the injuries on the two sides the accused persons received six as against seven on the complainants' side

[4] Amir and Shamir are partisan witnesses and Gahna appears to have been once convicted in a murder case besides which there is some indication of his being a partisan of the deceased as well Consequently, it would appear to be at least doubtful, in view of the dying declaration, and even more so, the first information report, whether any persons other than Jiwana and Fauja caused any injury to Mammu On the other hand, the prosecution evidence makes it clear that Amir was hit by Fauja and Shamir by Dara, and these two accused persons could properly have been charged under S 323, Penal Code, in respect of these injuries

and in self defence they inflicted injuries which caused Mammu's death. The other two accused persons said that they had been falsely implicated being near relatives of Jiwana and Fauja The learned Sessions Judge did not accept the version of the accused which included also an allegation that Jiwana had snatched the spear away from Mammu's hand, on the ground that as Mammu was a desparate character it was impossible to believe that having a spear in his hand he would not have inflicted some injury *with it He was also impressed by the fact that* in the course of the investigation, the spear blade was recovered at the instance of Jiwana which suggested that he had taken it away from the spot, and he would not have done this if it had not been his own spear

[6] *These reasons are cogent as far as they* go, but they do not cover all the circumstances arising out of the case The learned Sessions Judge has failed to give full weight to the fact that when, according to the prosecution witnesses, the trespassing animals were caught, they *had reached* a place about a 1000 yards away from the field which they are said to have damaged, that they were already on property belonging to the accused persons, and that the place where they were stopped was only about *20 karams* from the *bhaini* of the accused persons The sole right of Mammu and his brothers to seize the animals arose from the fact that the animals had trespassed into and damaged their fields This right is known in Common Law as the right of *distress damage feasant* Under this right, "trespassing animals may be seized and impounded to secure *compensation for* the damage done by them," but, the distress must be made at the time of the trespass and on the land, there is no doctrine of fresh pursuit in *distress damage feasant*, and the animal cannot be followed if once it goes off the land" (Halsbury, Hailsham Edn. Vol. 1, pp 518 and 550) In India, the right of seizure is embodied in S 10, Cattle Trespass Act, 1871, which lays down that the cultivator or occupier of any land "may seize or cause to be seized any cattle trespassing on such land, and doing damage thereto or to any *crop or produce thereon" and may send* such cattle within 24 hours to the established pound The phrase "any cattle trespassing on such land"

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cited before

*that a Government official found certain animals* grazing in a Government *rakh* and being told that there was a permit, allowed them to graze, but later he found that there was no permit, and going to the accused's well, where the cattle were found tethered, he attempted to take them to the pound, which the accused prevented him from doing The accused was tried under S 24, Cattle Trespass Act and duly convicted, but in revision it was held that the cattle were not seized when doing damage to the *rakh*, and as they had left the *rakh* and were at the well, they were not liable to seizure, for which reason the accused committed no offence in opposing the seizure 116 I C 403 is another Lahore case

their lives to the best advantage, that is to say, with a view to promoting their health and mutual happiness:

*Held*, such books when properly written, serve a useful purpose. Such books are published on a large scale and widely circulated in all civilised countries including Britain and the United States of America. If such books are effectively to fulfil their intended purpose it is obvious that they must be written in fairly plain language in order to be understood, and, it cannot be said that the publication of such books should be banned altogether because of the danger, against which it is undoubtedly very difficult to provide effective safeguards, that they may fall into the wrong hands. Passages held were not obscene. (1868) 3 Q. B. 360 *Rel. on*; 4 A. I. R. 1917 Lah. 288 and 19 I. C. 504 (Bom.), *Ref.* [Paras 3, 6]

**(b) Criminal P. C. (1898), S. 423—Appeal against acquittal under S. 292, Penal Code by Sessions Judge — Passages not relied on in appeal and on which trial Court acquitted accused, if can be considered.**

In appeal against an acquittal by the Sessions Judge under S. 292, Penal Code in respect of certain passages, the High Court cannot go into the passages not included in appeal and regarding which the trial Court had acquitted the accused, when the time for appeal against the order of the trial Court had expired: 19 A.I.R. 1932 Cal. 651, *Expl., and Disting.* [Para 5]

('46 Com.) Cr. P. C., S. 423, Notes 13 and 15.

*Cases referred:—*

1. (1868) 3 Q. B. 360 : 37 L. J. M. C. 89 : 18 L. T. 395 : 16 W. R. 801, Reg. v. Benjamin Hicklin.
2. ('33) 60 Cal. 201 : 19 A. I. R. 1932 Cal. 651 : 139 I. C. 461.
3. ('17) 25 P. R. Cr. 1917 : 4 A. I. R. 1917 Lah. 288 : 37 I. C. 478, Emperor v. Thakar Datt.
4. ('13) 19 I.C. 504 (Bom), Emperor v. Vishnu Krishna.

*S. Kartar Singh Asst. to Legal Remembrancer* — for the Crown.

*Ram Lal Anand and Surindar Nath Anand* — for Respondents.

**Falshaw J.**—In this case, Harnam Das and his son, Miraj Kishan respondents were convicted by a Magistrate of Lahore under S. 292, read with S. 34, Penal Code, and sentenced to fines of Rs. 500, and Rs. 100, respectively, but in appeal they were acquitted by the Sessions Judge, and the Crown has appealed against their acquittal.

[2] The prosecution was instituted with regard to an Urdu book called "Hadayat Nama Khawand" which was first published in 1924 and has since run through several editions. Harnam Das is apparently the author of the book and both the accused are alleged to be responsible for the publication of the latest edition. It appears that Harnam Das was previously prosecuted regarding Edition 5 of the book and was convicted under S. 292, Penal Code, on 28-10-1944, by Rai Sahib Chand Narain, Special Magistrate, who sentenced him to a fine of Rs. 100, after taking into consideration the facts that the author was a man of position and respectability, that his motive for publishing the book was good and that the language of the book as a whole was not objectionable, and also that Harnam Das had given an undertaking that he would in future editions delete all those passages which were held to be obscene. In the latest edition of the book most of the passages which had been held to be obscene were *omitted*, other passages being substituted for them, but a few of the passages were allowed to stand and reappeared in the new edition. From the first information report, on the basis of which the present prosecution was instituted at the instance of an Inspector of the C. I. D., it would appear that the main ground for the present prosecution was that the passages which had now been substituted for the passages which had been held to be obscene and been deleted were even more obscene. After considering the evidence, however, the learned trial Magistrate came to the conclusion that the substituted passages were not objectionable to the extent of being obscene and convicted the respondents on account of six particular passages in the book which were among those previously held to be obscene and which had not been deleted by the accused in the new edition. In the appeal, the learned Sessions Judge has considered only these six passages and has come to the conclusion in each case that the words used were not obscene and has acquitted both the accused on this ground without going into the question, which in these circumstances did not arise, whether Miraj Kishan respondent could also be held liable along with his father for the publication of the alleged obscene matter. The first question to be decided is whether the passages with regard to which the respondents were convicted are obscene. The translation of the offending passages prepared by P. W. 11, a translator of the Press Branch of the Secretariat, is as follows:

"(1) If at the same time one suffers from nocturnal emissions such one should act upon No. 1 to 15.

(2) Again if a man's penis does not become sufficiently stiff on going near the woman he should use meat and eggs.

(3) One should avoid woman and thinking of woman for four to six months and should not be excited for one moment, even sexual organ should be given complete rest for four to six months.

(4) It will be better if you turn your attention otherwise. In Kama Sutra it is advised to think of the monkey. 'He has climbed the window, he has jumped and climbed on the horse's back. He has snatched the girl's *dopatta*; some one has scared him away with a stick. There he has again done mischief while running away and has overturned the hawker's tray. There appears a tonga. He has climbed on to the tonga driver's head. Behold, he has run away with his turban' and so forth. Such imaginative pictures should be called to mind or if you have seen any monkey making mischief you should think of it, or recall any happy or sad incident of your life and keep your thoughts away from copulation but continue exciting your wife. In the meantime the wife will become ready but your brain will be cool. By cohabiting in this way man does not suffer from premature ejaculation.

automatically applicable I may refer to two decisions throwing considerable light upon this matter 4 Rang 304[1] and A I R. 1913 Cal 247[2] The preliminary objection raised by the respondent is upheld and the petition is dismissed

C R K/N S *Order accordingly*

## A. I. R (34) 1947 Madras 401 [C. N 214]

GENTLE C J AND RAJAMANNAR J

*Velicheti Satyanarayana — Appellant v Koppaka Venkataramayya (minor) represented by father and guardian Satyam and others — Respondents*

Letters Patent Appeal No 86 of 1946 Decided on 7 2 1947 from judgment of Somayya J in S A No 1165 of 1945 D/ 26 4 1946

Madras Co operative Societies Act (6 [VI] of 1932) S 57 — Notice to affected party

An order under S 57 is a judicial order and such an order can only be passed after giving to the parties interested or concerned an opportunity to be heard Hence before an order is passed against any one under S 57 notice to him is necessary and in the absence of such notice the order would be *ultra vires*

(Powers of High Court under S 115 Civil P C and S 435 Criminal P C compared) 1911 A C 179 1915 A C 120 and (1874) 9 Ex 190 *Rel on* [Para 10]

*Cases referred —*

1 (1911) 1911 A C 179 80 L J K B 796 104 L T 689 Board of Education v Rice
2 (1915) 1915 A C 120 84 L J K B 72 111 L T 905 Local Government Board v Arlidge
3 (1874) 9 Ex 190 43 L J Ex 105 30 L T 815 22 W R 709 Wood v Wood

*P Satyanarayana Rao and A Sambasiva Rao — for Appellant*

*Ch Raghava Rao — for Respondents*

**Gentle C J** — This is an appeal pursuant to the Letters Patent of this Court by the plaintiff in the suit from a judgment of Somayya J sitting in second appeal, reversing the learned Subordinate Judge of Narasapur who dismissed an appeal from the learned District Munsif of Narasapur The matter for determination is whether an order passed by the Provincial Government under S 57, Madras Co operative Societies Act 6 [VI] of 1932, (hereinafter called "the Act ) is valid

[2] The facts are a little complicated, but so far as they are relevant to this appeal, they can be shortly stated On 8 1 1935 the plaintiff purchased an immovable property at a sale in execution of a decree upon an award passed under the Act On 6 3 1935 the sale was confirmed and on 17th September of the same year a sale certificate was issued to the plaintiff and he was put in possession of the property. Before the confirmation of the sale, defendant 1 in the suit the respondent in this appeal, who is the nephew of the deceased original debtor, applied to the Deputy Registrar of Co operative Societies to set aside the sale This application was dismissed on 6 3 1[illegible] the same date the sale was confirm[illegible] defendant 1 instituted a suit in the[illegible] the District Munsif at Narasapur to have the sale set aside That suit [illegible] missed on 18 4 1938 and defendant 1's [illegible] the Subordinate Judge against the decisi[illegible] District Munsif was dismissed on 12 12 [illegible] 30 12 1939 defendant 1 applied to the R[illegible] of Co operative Societies under S 57 of [illegible] to set aside the sale On 8 5-1941, this app[illegible] suffered the same fate as other proce[illegible] initiated by defendant 1 On 19 8 1941 the n[illegible] further application under S 57 this ti[illegible] the Provincial Government seeking the [illegible] relief Notice of this application was not g[illegible] to the plaintiff who was ignorant of it b[illegible] made, and without him having been given [illegible] opportunity to have heard and without being apprised of what was taking place [illegible] 18 12 1941 the Provincial Government pas[illegible] an order setting aside the sale Defendant 1 c[illegible] not disclose in his application to the Provinc[illegible] Government that he had previously applied [illegible] the Registrar and his application had been dis[illegible] missed On 5 2 1942 the plaintiff instituted the suit, out of which this appeal arises in the Court of the District Munsif of Narasapur claiming a declaration that the order of the Provincial Government was void illegal and *ultra vires* of its powers and did not affect his rights to the property The District Munsif decreed the suit in favour of the plaintiff His decision was upheld on appeal to the Subordinate Judge of Narasapur but on second appeal to the High Court, Somayya J reversed the lower Courts and held that the order of the Provincial Government was valid He also directed that each party should bear his own costs throughout This is the plaintiff's appeal from the learned Judge's reversal of the two lower Courts

[3] The position at the date when the order was passed by the Provincial Government is interesting The plaintiff had purchased the property paid the price, the sale to him had been confirmed, he had been granted a sale certificate and, by 17 9 1935 he had been put in possession of the property During the ensuing six years defendant 1 unsuccessfully sought to have the sale set aside by the Deputy Registrar of Co operative Societies in 1935, by a suit which was dismissed in 1938, by an appeal therefrom which was dismissed in 1939 and by an application in 1939 to the Registrar which was dismissed in 1941

[4] The question which has now to be considered is whether S 57 of the Act empowers the Provincial Government to allow an a[illegible] made to it and to mal[illegible]

their lives to the best advantage, that is to say, with a view to promoting their health and mutual happiness:

*Held*, such books when properly written, serve a useful purpose. Such books are published on a large scale and widely circulated in all civilised countries including Britain and the United States of America. If such books are effectively to fulfil their intended purpose it is obvious that they must be written in fairly plain language in order to be understood, and, it cannot be said that the publication of such books should be banned altogether because of the danger, against which it is undoubtedly very difficult to provide effective safeguards, that they may fall into the wrong hands. Passages held were not obscene. (1868) 3 Q. B. 360 *Rel. on*; 4 A. I. R. 1917 Lah. 288 and 19 I. C. 504 (Bom.), *Ref.* [Paras 3, 6]

(b) Criminal P. C. (1898), S. 423—Appeal against acquittal under S. 292, Penal Code by Sessions Judge — Passages not relied on in appeal and on which trial Court acquitted accused, if can be considered.

In appeal against an acquittal by the Sessions Judge under S. 292, Penal Code in respect of certain passages, the High Court cannot go into the passages not included in appeal and regarding which the trial Court had acquitted the accused, when the time for appeal against the order of the trial Court had expired: 19 A.I.R. 1932 Cal. 651, *Expl., and Disting.* [Para 5]

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automatically applicable I may refer to two decisions throwing considerable light upon this matter 4 Rang 204[1] and A I R. 1943 Cal 247[2] The preliminary objection raised by the respondent is upheld and the petition is dismissed
C R K /N S *Order accordingly*

## A. I. R (34) 1947 Madras 401 [C. N 214]

GENTLE C J AND RAJAMANNAR J

*Velicheti Satyanarayana — Appellant v. Koppaka Venkataramayya (minor) represented by father and guardian Satyam and others — Respondents*

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[3] The position a[illegible] was passed by the [illegible] interes[illegible] perty, paid the [illegible] confirmed he ha[illegible] and, by [illegible] of the pro[illegible] defendan[illegible] sale [illegible] [illegible]

a sale without the purchaser being given notice of the application and without him having an opportunity of presenting his case and of being heard. If there is no such power then, since the order made by the Provincial Government setting aside the sale was passed without notice and opportunity to the purchaser, the order of the Provincial Government is invalid and it will follow that a consideration of the other questions arising in the appeal will not be required.

[5] Section 57 of the Act provides as follows:

"The Provincial Government or the Registrar may call for and examine the record of any enquiry or the proceedings of any officer subordinate to them for the purpose of satisfying themselves as to the legality or propriety of any decision or order passed and as to the regula-ity of the proceedings of such officer. If in any case it shall appear to the Provincial Government or the Registrar that any decision or order or proceedings so called for should be modified, annulled, or reversed, the Provincial Government or the Registrar, as the case may be, may pass such order thereon as to it or him may seem fit."

In regard to the phraseology of the above section, Somayya J. observed in his judgment as follows:

"It looks as if the Legislature has deliberately given very wide powers so that they (the Provincial Government) may do justice according to the needs of the situation untrammelled by any limitation or conditions."

The enquiry or proceedings mentioned in the section, in the present instance, was or were the subject of the record which the Provincial Government called for and examined, namely, the application to the Deputy Registrar and his dismissal of it which took place in 1935, six years prior to the application to, and the order by, the Provincial Government under S. 57. In his judgment, Somayya J. observed that he was "inclined to hold that the action of the local Government cannot be said to be vitiated for the reason that no notice was given to the respondent" (the plaintiff in the suit and the appellant in the present appeal).

[6] In argument it was contended for defendant 1, respondent, that the power and the authority given by S. 57 to the Provincial Government is to act in an administrative capacity, and the order setting aside the sale was an order made in the exercise of administrative authority. It was also contended that, since the section is silent as to notice being given to the party who might be affected by an order, notice to him is unnecessary and an order can be made without notice being given. It is to be observed that the action taken by the Provincial Government and the order which it made, in effect, were to deprive the plaintiff of property which he had purchased and paid for and had occupied for some six years prior to the order being made and to make him a trespasser upon land for which he had paid the full purchase price and been put in possession.

[7] In considering the meaning and effect of S. 57 of the Act reference to S. 115, Civil P. C., is instructive. It reads as follows:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears—(a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

As in S. 57 of the Act, S. 115, Civil P. C., empowers the record to be called for in a case which has been decided, and also, it does not mention that notice shall be given to the party who will be affected by an order which may be made by the High Court. The concluding words of both S. 57 of the Act and S. 115 of the Code confer powers to make an order which the High Court or the Provincial Government, as the case may be, thinks proper or fit. It is beyond doubt—and the contrary cannot be, and indeed has not been, suggested—that the High Court cannot make an order under S. 115 of the Code adverse to any party in the absence of a notice being given to him, so that he may have an opportunity of being heard.

[8] It is clear, and indeed it was not disputed, that when the Deputy Registrar dismissed the application by defendant 1 to set aside the sale, the Deputy Registrar acted in a judicial capacity and exercised judicial functions. Section 57 requires an examination of the record by the Provincial Government which must be for the purpose of satisfying itself as to the legality or propriety of any decision or order and as to the regularity of the proceedings of the officer. It is only after the Government is satisfied with regard to the matter that it can pass an order contemplated by S. 57 For the purpose of determining whether an order should be made for modification, annulment or reversal, the Provincial Government must first make a decision as to the legality or the propriety of the decision at the enquiry or as to the regularity of the proceedings under review.

[9] Assistance is given by reference to a few authorities which now I propose to quote. In 1911 A. C. 179[1] the action of a local education authority was considered. It is observed by Lord Loreburn L. C. at p. 182 of the report as follows:

"In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such

cases the Board of Education will have to ascertain the law and also to ascertain the facts I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything'

Particular emphasis should be placed upon the concluding words of the quotation In 1915 A C 120[2] Viscount Haldane L C at p 133 referred with approval to the above quotation in 1911 A C 179[1] In (1874) 9 Ex 190[3] the action of a Committee of a mutual insurance Society was reviewed At p 196 of the report Kelly C B made the following observations

"It is contended for the plaintiff that the language of the rules gives an unconditional and absolute power to the committee to expel a member of the society and I agree that if the committee in fact exercised their power under the rules, their decision could not be questioned however unfounded the reasons for it may have been, it would have been final and could not be reviewed by any Court But they are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence This rule is not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body or persons invested with authority to adjudicate upon matters involving civil consequences to individuals"

In the present instance, the civil consequence to the plaintiff of the order passed by the Provincial Government in his absence is to deprive him of the right to property which he had acquired six years before the order of deprivation was passed

[10] To enable a decision to be made regarding the correctness or otherwise of the decision which the local Government calls for and examines pursuant to S 57, it must properly consider all the facts, circumstances and legal principles involved I can see no provision in S 57 which empowers the Provincial Government automatically, and at its own whim and pleasure, to interfere with the decision made by an authorised officer when exercising judicial functions When reviewing such a decision, the Provincial Government, in my view, must act in the same way and to the same extent as the officer whose decision is under review When exercising its powers given by the section the Provincial Government is in the same position as the officer in that it exercises judicial and not [ad]ministrative functions In my opinion, it is [bey]ond doubt that a decision which has to be [made] under S 57 can only be judicially arrived [at] When a judicial decision has to be made, [opp]ortunity must be afforded to parties interest[ed and] concerned so as to give them an opportu[nity t]o be heard before the decision is given. [The se]ction not only empowers action by the [Provi]ncial Government but it confers similar [power]s upon the Registrar I cannot think that there was ever an intention, and, in my op[inion] the section does not go to the extent, of [allow]ing interference by a Registrar with a ju[dicial] decision of an officer, behind the backs of [inte]rested parties in the absence of an opportu[nity] to them of being heard so as to deprive t[hose] parties of rights which they had obtained [by] virtue of an order made by an officer duly [ap]pointed for the purpose The Provincial Gove[rn]ment is in exactly the same position as t[he] Registrar with regard to the powers and t[he] exercise of them given under S 57 So far a[s] material, the wording of S 57 corresponds t[o] that of S 115 of the Code There is nothing i[n] S 57 from which it can even be inferred that action under the section can be exercised diffe[rently] to that under S 115 of the Code or to the corresponding S 435, Criminal P C, in regard to action by the High Court in criminal matters Under the sections of both Codes, the person who may be affected by the exercise of the powers given by the sections must be given notice of the proceedings so as to enable him to have an opportunity to be heard before an order can be made In Edn 8 of Maxwell on the Interpretation of Statutes, for which I am indebted to my learned brother the position is succinctly summarised at p 316 where it is stated as follows

"Again in giving judicial powers to affect prejudicially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide the condition or qualification that the power is to be exercised in accordance with the fundamental rules of judicial procedure such, for instance, as that which requires that before its exercise the person sought to be prejudicially affected shall have an opportunity of defending himself"

In my view, S 57 requires notice to be given to the party likely to be affected before an order can be made and if the powers given by the section are exercised without a potential affected party being given an opport[illegible] being heard, the order is one which [illegible] the powers of the authority [illegible]

[11] I have no doubt tha[illegible] order setting aside the sal[illegible] out notice being given to [illegible] application to the Provi[illegible] at a time when he w[illegible] course which was th[illegible] cial Government, a[illegible] exercise of it [illegible] S 57 and th[illegible] and is inva[illegible]

[12] I[illegible]

nate Judge restored. The plaintiff-appellant is entitled to his costs both in this appeal and before Somayya J. as well as the costs of the proceedings before the Subordinate Judge and the District Munsif.

**Rajamannar J.** — I agree.

C.R.K./V.B.B. *Appeal allowed.*

## A. I. R. (34) 1947 Madras 404 [C.N. 216.]

RAJAMANNAR J.

*Perumal and others — Petitioners v. Perumal Reddiar and another — Respondents.*

Civil Revn. Petn. No. 282 of 1946, Decided on 10-12-1946, from decree of Dist. Munsif, Turaiyur, D/-14-11-1945.

(a) Provincial Small Cause Courts Act (1887), Art. 35 (ii) — Applicability — Test — Suit for value of tamarind gathered by plaintiff alleged to have been taken away by defendant.

Whether a suit falls within the Article is prima facie a matter to be decided on the language of the plaint: 17 A.I.R. 1930 Bom. 331; 19 A. I. R. 1932 All. 472 and 13 A. I. R. 1926 All. 761 Rel. on.

Where the plaintiff alleges that the defendants took away the tamarind belonging to him after it was gathered by him and seeks to recover the value of the tamarind the suit does not come under Art. 35 (ii) as the allegation does not disclose the commission of theft. [Para 2]

(b) Provincial Small Cause Courts Act (1887), Art 11 — Suit in respect of tamarind gathered from tree.

Tamarind when gathered from tree is movable property and a suit in respect of the same is cognizable by the Small Cause Court. The fact that incidentally the question of title to immovable property namely, the tree, may have to be gone into does not make the suit one relating to a right to immovable property so as to take away the jurisdiction of the Small Cause Court. [Para 3]

Cases referred to:

1. ('30) 17 A. I. R. 1930 Bom 331: 125 I. C. 440, Sabaya v. Sadashiv.
2. ('32) 19 A. I. R. 1932 All. 472 : 140 I. C. 669, Shau Dat v. Motilal.
3. ('27) 49 All. 95: 13 A. I. R. 1926 All. 760: 97 I. C. 121, Dwarka v. Harakh Narayan Lal.

*K. V. Rangachari* — for Petitioners.

*A. Seshachari* — for Respondents.

**Order.** — The only question which arises for decision in the civil revision petition is whether the suit is excepted from the cognizance of the Small Cause Courts because the claim falls under Art. 35 (ii), Sch. 2 of the Act which runs as follows:

"A suit for compensation for an act which is, or, save for the provisions of Chapter IV, of the Indian Penal Code, would be, an offence punishable under Chapter XVII of the said Code."

The suit was for the recovery of a sum of Rs. 65 being the value of tamarind belonging to the plaintiff alleged to have been taken away by the defendants on 1.3.1946. The learned District Munsif of Turaiyur held that the suit did not fall within the scope of this Article and decreed the suit finding on the merits in favour of the plaintiff. The defendants are the petitioners in this Court.

[2] Though a number of decisions were cited before me by both the learned advocates for the petitioners and respondents, in every decision the learned Judges make it clear that whether a suit does or does not fall within the articles is prima facie a matter to be decided upon the language of the plaint: see the decisions in A. I. R. 1930 Bom. 331;[1] A. I. R. 1932 All. 472[2] and 49 All. 95.[3] I have been taken through the plaint and on a fair and ordinary consideration of the plaint it appears to me that the present suit does not fall within that article. I cannot say that on a fair reading of the plaint, it discloses the commission of criminal offence by the defendants. The material paragraph is the fourth in which it is alleged that on 1.3.1946 the plaintiff gathered the tamarind from certain trees and tried to collect the same, but the defendants joined together and unlawfully took away the tamarind thus causing loss to the plaintiff. The learned advocate for the petitioners wants me to hold on this language that the plaintiff alleges the commission of theft by the defendants, as if the plaintiff had said that the defendants with the dishonest intention of causing unlawful gain to themselves and loss to the plaintiff took away the tamarind. On the other hand, what I find in the plaint is that the defendants took away the tamarind and thus caused loss to the plaintiff. The language in some of the cases cited on behalf of the petitioners is not identical with the language used in the plaint in this case. I agree with the learned District Munsif that the case does not fall within Art. 35 (ii) of Sch. 2, Provincial Small Cause Courts Act.

[3] It was also contended by the petitioners that the suit relates to a right to immovable property because while the plaintiff alleges that the trees belong to certain temples, the defendants claim that they are situated on their own land. He, however, conceded that when trees were cut they became movable property and a suit in respect of such trees when cut would be cognizable by a Court of Small Causes. I do not find any distinction on principle between trees which have been cut and produce which has been gathered from the tree. After the tamarind has been brought down from the tree, as alleged by the plaintiff, it is certainly movable property. The fact that incidentally the question of title to immovable property may have to be gone into does not take away the jurisdiction of the Small Cause Court. I do not agree with this contention of the petitioners. In the result the civil revision petition is dismissed with costs.

*Petition dismissed.*

C.R.K./D.H.

**A I R (34) 1947 Madras 405 [C N 216]**

LEACH C J AND LAKSHMANA RAO J

*Dhulipalla Brahamaramba—Petitioner* v *Dhulipalla Seetharamayya and others — Respondents*

Civ l Revn Petn No 1409 of 1945 D c ded on 12 12 1946 rom order of Sub Judge Tenali D/ 11 9 1945

**Civil P C (1908) O 33 R 7—Death of applicant for leave to sue as pauper pending application—Legal representative if can continue su t—Lim ta tion—Civil P C (1908) S 149 and O 33 R 1**

An appl cation for leave to sue in forma pauper s is a composite document a pla nt coupled w th a prayer to be allowed to sue without payment of court fee Where the appl cant for leave to sue in forma pauper s dies during the pendency of his appl cat on h s legal repre entative can be brought on the record and allo ed to continue the su t on payment of the requ s te court fee 30 A I R 1943 Mad 646 *Dissent* 15 A I R 1928 Mad 278 and 21 A I R 1934 Mad 467 *Approved* 2 All 241 (P C) *Rel on* [Paras 3 11]

Section 149 applies to such a ca e and l m tation must be deemed to have stopped on the date on which the appl cation for leave to sue in forma pauperis was filed [Para 11]

(44 Com) C P C, O 33 R 1 N 11 Pts 6, 7 O 33 R 7 N 6 Pts 1, 2 S 149, N 7 Pt 11

*Cases referred —*

1 (43) 1943 2 M L J 180 30 A I R 1943 Mad 646 211 I C 431 Anasuyyamma v Subba Redd

2 (35) 58 Mad 169 21 A I R 1934 Mad 467 151 I C 219 Dura pand ya v Sola malai Pi lai

3 (78 80) 2 All 241 6 I A 126 3 Suther 627 4 Sar 31 (P C) Stuart Sk nner v W lliam O de & Co

4 (24) 46 M L J 204 11 A I R 1924 Mad 115 76 I C 767 Balaguru Na du v Muthuratnam Iyer

5 (30) 69 Cal 711 23 A I R 1936 Cal 28 160 I C 586 Jagadeeshwaree Debee v Tinkari B b

6 (30) 9 Pat 439 16 A I R 1929 Pat 637 118 I C 309 Bank of B har Ltd v Sri Thakur Ramchand arji Maharaj

7 (37) I L R (1937) All 29 23 A I R 1936 All 581 164 I C 305 (F B) Channamal v Bhagwant Kishore

8 (39) 1939 1 M L J 96 26 A I R 1939 Mad 60 I L R (1938) Mad 1060 179 I C 80 Chidambaram v Na araja Mudal ar

(43) I L R (1943) Bom 138 30 A I R 1943 Bom 14 207 I C 59 Totaram Ichharam v Dattu Mangu

(25) 51 Mad 697 15 A I R 1928 Mad 278 110 C 318 Subb ah v Bala Tr pura Sundara

(36) 15 Pat 739 23 A I R 1936 Pat 591 165 C 927 Mt B bi Mar m v Surajmal

(46) 33 A I R 1946 Nag 390 I L R (1946) Nag 3 224 I C 61 Annapurna Bai v Balaji Maroti

*dvocate General and K Ramesashayya — f r Pet ers*

*Subramaniam K Kotiyya and Ch Raghava —for Respondents*

**each C J** —One Dhulipala Venkata Subba an l his two minor brothers Sreedhara Rao Butchaiya filed an application in the Court e Subordinate Judge, Tenali, asking to be ed to sue *in forma pauperis* for a decree e partition of immovable property The ation complied with all the requirements of the Code of Civil Procedure with regard to plaint. The document was in form and substance a plaint coupled with a prayer to be allowed to sue without payment of the court fee Before the Court had time to inquire into the alleged pauperism of the petitioner Dhulipala Venkat Subba Rao died Thereupon his mother, the petitioner now before us applied to be brought on the record as his legal representative and to be allowed to continue the suit in his place She signified her willingness to pay the court-fee The Subordinate Judge relying on the judgment of Horwill J in 1943 2 M L J 180[1] dismissed the application The petitioner then asked this Court to set aside the order of the Subordinate Judge in the exercise of its revisional powers In the first instance the matter came before Happell J who referred it to a Bench for decis on In his order of reference the learned Judge pointed out that the decision of Horwill J was in conflict with the judgment of Bardswell J in 58 Mad 169[2]

[2] It follows from what we have said that the question involved is whether the legal representative of a person who dies during the pendency of an applicat on to be allowed to sue *in forma pauperis* can be brought on the record and allowed to prosecute the suit on payment of the requ site court fee The decision of the question requires the cons deration not only of the two cases referred to but of the judgment of the Privy Council in 2 ALL 241[3] and of other authorities The judgment of the Privy Council in 2 ALL 241[3] has a very important bearing on the question under discussion but its effect has not always been properly understood There a person applied for leave to sue as a pauper but pending the inquiry into his alleged pauperism he obtained funds which enabled him to pay the court-fee He was allowed by the Court to pay the court-fee, whereupon his petition was numbered and registered as a plaint. The Judicial Committee held that in those c rcumstances the suit should be deemed to have been instituted from the date when the pet t

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Code of Civil ... was then in force After referring to its provisions with regard to applications to sue *in forma pauperis* Sir Montague F Smith in delivering the judgment of the Board, said

"Therefore it (the petition) contains in i self all the part culars the statute requires in a plaint, and plus these a prayer that the pla nt ff may be al owed to sue *in forma pauperis*

Later in the j nt S r Mon E. Smith sa d

'Although ... is not ... pened is m. ... it wh ... is hap ... y hap-

pens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it."

There is no essential difference between an application to sue *in forma pauperis* under the present Code and an application under the Code of 1859.

[3] It follows from what was said in the judgment in 2 ALL. 241[3] that such an application is in fact a plaint coupled with a prayer to be allowed to sue without payment of the required court-fee. A plaint which does not bear the court-fee prescribed by law, in whole or in part, can by reason of S. 149 of the present Civil Procedure Code be stamped with the permission of the Court at any stage and when this is done the document has the same force and effect as if the fee had been paid in the first instance. There were no such provisions in the earlier Codes.

[4] Order 33, R. 15 of the Code now in force provides that an order refusing to allow the applicant to sue as a pauper shall be a bar to a subsequent application of the same nature in respect of the same right to sue, but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of the right claimed provided he pays the costs, if any, incurred by the Provincial Government and by the opposite party opposing the application for leave to sue as a pauper. It has always been the practice of this Court, when an application to sue *in forma pauperis* has been refused, to allow the applicant to pay the requisite court-fee within a stipulated period and, on payment of the court-fee within the time allowed to regard the suit as having been instituted on the date on which the application for leave to sue *in forma pauperis* was presented.

[5] The nature of an application to sue *in forma pauperis* has been discussed on numerous occasions in Indian High Courts, since the present Civil Procedure Code came into force. In 46 M. L. J. 254[4] this Court (Krishnan J.) held that an application to sue as a pauper is a combination of a plaint and an application to excuse the payment of the court-fee on it. The Calcutta High Court gave a pronouncement to the same effect in 62 Cal. 711[5] as did the Patna High Court in 9 Pat. 439.[6]

[6] On the other hand, two of the Judges of a Full Bench of the Allahabad High Court held in I. L. R. (1937) ALL. 22[7] that an application to sue as a pauper was not a composite document, although the third Judge was of the opinion that it was. There an application for leave to sue as a pauper was refused and an application for a review of the order met with a similar fate, but the Court of first instance allowed time to the petitioner to deposit the requisite court-fee. In revision the High Court by a majority held that when an application for leave to sue as a pauper is rejected under O. 33, R. 7 (3), the Court cannot under S. 149 of the Code allow the applicant to pay the requisite court-fee and treat the application as a plaint The majority opinion was expressed by Sulaiman C. J. and Bennet J. The dissentient Judge was Allsop J. The learned Chief Justice and Bennet J. held, however, that when the rejection was under O. 33, R. 5, time to pay the requisite court-fee could be allowed. Sulaiman C J. and Bennet J. considered that the judgment of the Privy Council in 2 ALL. 241[3] did not apply but we can see no real ground for distinction. We consider that in 2 ALL. 241[3] the Privy Council unquestionably held that an application to sue *in forma pauperis* is a composite document, a plaint coupled with a prayer to be allowed to sue without payment of court-fee.

[7] There are two decisions, one of this Court and one of the Bombay High Court in which interlocutory applications have been granted as in a suit during the pendency of an application to sue *in forma pauperis*. In 1939-1 M.L.J. 96[8] Gentle J. held that on the presentation of a petition for leave to sue *in forma pauperis* the suit should be deemed to have been instituted on that date and consequently the application for a Commissioner to take an inventory of movable property was properly made within the meaning of O. 39, R. 7, Civil P. C. The application was filed before there had been any inquiry into the pauperism of the applicant. In I. L. R. (1943) Bom. 138,[9] Beaumont C. J. and Wassoodew J. held that an application for the appointment of a Commissioner to take an inventory of property could be filed along with a petition for leave to sue *in forma pauperis* and be dealt with by the Court under O. 39, R 7 of the Code. The learned Chief Justice said that he entertained no doubt that the plaint whether it consisted of the original plaint, or of the petition deemed to be a plaint, took effect from the date when the plaint and the petition were presented.

[8] We are concerned in the present case with the position when the petitioner dies during the pendency of an application for leave to sue as a pauper. Our attention has been drawn to five reported cases where this has been the position. Three of them are decisions of this Court. In 51 Mad. 697[10] Srinivasa Aiyangar J. held that where a petitioner dies during the pendency of his application for leave to sue *in forma pau-*

*peris* his legal representative is not entitled to continue the further prosecution of the petition The basis of this decision was that the application to sue *in forma pauperis* is purely a personal relief and, therefore, the legal representative cannot stand in the applicant's shoes The learned Judge was, however, careful to indicate that there was no objection to the legal representative being brought on the record if he wished to continue the proceedings as a suit by the payment of the requisite court fee In 58 Mad 169[2] the sons of a deceased petitioner applied to be joined as his legal representatives and sought to proceed with the suit on payment of the rest of the court fee It was held by Bardswell J that this was permissible The learned Judge's opinion coincided with that expressed by Srinivasa Aiyangar J This is the second of the two cases mentioned by Happell J in his order referring the present petition to a Bench

[9] We now come to the first case referred to in the order of reference, namely, 1913 2 M L J 180[1] There Horwill J held that the right of a legal representative was merely to file a fresh application to sue *in forma pauperis* or institute a separate suit No reference was made in the judgment to the decision in 58 Mad 169[2] Horwill J considered that on the death of the person applying for leave to sue as a pauper his application abates, and that it would not be possible for the Court to overlook the break and to regard the plaint as having been presented by the legal representative on the day when the application was originally filed This decision is not only in conflict with the judgments in 51 Mad 607[10] and 58 Mad 169,[2] but it ignores the fact that an application for leave to sue *in forma pauperis* is a plaint and that the legal representative of the applicant is entitled to enforce all the rights which he possesses. Moreover, the learned Judge also ignored the provisions of S 149, Civil P C He considered the decision in 51 Mad 607[10] supported his view but here he overlooked the fact that Srinivasa Aiyangar J. expressed the opinion that the legal representative could continue the suit on payment of the requisite court fee

The other two cases which have reference to the position when the petitioner dies are ... 35[11] and A I. R 1916 Nag 820[12] In the ... case, a Division Bench of the Patna High Court held that the legal representative of a deceased petitioner could continue the proceedings as a suit on payment of the requisite court fee. In A. I. R 1916 Nag 820,[12] the Nagpur High Court expressed the same opinion and said that the legal representative was in reality substituted for the deceased party in his capacity as the plaintiff and not as one suing for exemption from payment of court fee.

[11] As the application for leave to sue *in forma pauperis* embodied a plaint, we hold that the petitioner is entitled in law to be brought on record as the legal representative of Dhulipala Venkata Subba Rao and to continue the suit on payment of the requisite court-fee We have shown that there is ample authority to support this decision We also hold that limitation must be deemed to have stopped on the date on which Dhulipala Venkata Subba Rao filed his application for leave to sue *in forma pauperis* Here S 149, Civil P C, applies

[12] The application for revision is allowed and the case remanded to the Subordinate Judge to decide whether the petitioner is in fact the legal representative of Dhulipala Venkata Subba Rao If she is, he must substitute her name for his and allow her to continue the suit on payment of the court fee payable in respect of his share It may be added that the minors Sreedhara Rao and Butchaiya have already been permitted to pay the court fee on their shares and continue the suit in the ordinary way The petitioner is entitled to her costs

C R.K./G N

*Case remanded*

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## A. I. R (34) 1947 Madras 407 [C N 217]

WADSWORTH AND GOVINDARAJACHARI JJ.

*Ayish Bi Bi — Petitioner v. Muhammad Sadakathulla Marcair and others — Respondents*

Civil Revn Petn No 336 of 1946, Appeal against Order No 209 of 1946, and Civil Misc Petn No 1535 of 1946, Decided on 28 11 1946 to revise order of Sub Judge, Cuddalore, D/ 11 1 1946

Madras Civil Courts Act (3 [III] of 1873) Ss 12 and 13 — Forum of appeal — Erroneous value of subject-matter fixed in plaint — Suits Valuation Act (1887), Ss 8 and 11

Reading Ss 12 and 13 together when a suit is entertained by the District Munsif's Court, on the basis of its own valuation that valuation will determine the forum of the appeal and nothing in S 13 will justify the entertainment of an appeal by the High Court from the decision of the District Munsif's Court, even though on a correct valuation the suit should have been tried by the Court of the Subordinate Judge and the appeal should have been laid to the High Court 11 A I R 1924 Mad 6 (F B) and 5 A I R 1918 Mad 993, (F B), *Rel on.* 30 A. I. R. 1943 Mad 242, *Doubted* *Case law discussed* [Paras 5 & 6]

(44 Com.) Suits Valuation Act, S 8 N 33 Pt 1, S 11 N 12 Pt 7

*Cases referred* —

1 ('42) 1942 2 M L. J 597 30 A I R. 1943 Mad 242 : I L. R (1943) Mad 497 : 207 I. C 331, Kadir Hussain Rowther v Jamila Bibi

2 ('17) 40 Mad 1 5 A I R. 1919 Mad 993 : 39 I. C. 439 (F. B) Kannayya Chetti v Venkatanarasayya

3 ('03) 26 Mad 91 (F B), Krishnamachamal

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4. ('23) 46 Mad. 631 : 11 A. I. R. 1924 Mad. 6 : 73 I. C. 87 (F. B.), Kelu Achan v. Parvathi Nethiyar.
5. ('93) 16 Mad. 326, Vasudeva v. Madhava.
6. ('16) 39 Mad. 447 : 3 A. I. R. 1916 Mad. 631 : 28 I. C. 624, Jalladdeen Marakayar v. Vijayasami.
7. ('10) 20 M. L J. 726 : 8 I. C. 545, Raghavachariar v. Raghavachariar.
8. ('45) 58 M. L. W. 282 : 32 A. I. R. 1945 Mad. 194, In Re, Sri Ramulu Chetti.

*T. E. Ramabhadrachariar and M. S. Krishnaswami Iyangar*—for Appellant.
*K. Srinivasan* —for Respondents.

**Wadsworth J.** — All those three matters arise out of an order in appeal from the decision in O. S. No. 391 of 1942 on the file of the District Munsif's Court, Cuddalore, which was a suit for partition and possession of the share of the widow in the estate of one Khadirsa Maracair. The total value of the estate was approximately Rs. 41000 in which the plaintiff's share was just under Rs. 3000. The plaintiff valued the suit for purposes of jurisdiction at Rs. 2979-10-2, treating it as a suit for partition. The suit was decreed in part and an appeal was preferred to the District Court of South Arcot, but was transferred to the Court of the Subordinate Judge, Cuddalore. The respondents took a preliminary objection that the suit filed as a suit for partition was, in substance, a suit for administration of the estate of the deceased Khadirsa Maracair and should have been valued on the total value of the estate. Accepting this contention and relying on the decision of King J. in 1942-2-M. L. J. 587,[1] the learned Subordinate Judge held that the only Court which could hear the appeal is the High Court. The memorandum of appeal was therefore returned for presentation to the proper Court. Against this order, C. M. A. No. 209 of 1946, and, in the alternative, C. R. P. No. 336 of 1946, have been preferred. The connected C. M. P. No. 1585 of 1946 has been filed by way of abundant caution, praying that in case the High Court holds that the appeal lies to this Court, the delay may be excused and the memorandum of appeal may be received.

[2] It is now conceded that no appeal lies against an order returning the memorandum of appeal and that the correctness of the lower appellate Court's order can only be canvassed in the civil revision petition. Section 12, Madras Civil Courts Act provides that the jurisdiction of a District Munsif extends to

"all like suits not otherwise exempted from his cognizance, of which the amount or value of the subject-matter does not exceed Rs. 3000."

Section 13 of that Act provides that appeals from the decrees and orders of the Subordinate Judges and District Munsifs shall, when such appeals are allowed by law, lie to the District Court, except when the amount or value of the subject-matter of the suit exceeds Rs. 5000, in which case the appeal shall lie to the High Court. For the petitioner it is contended that the provision of S. 13 has to be read along with the provisions of S. 12 of the Act and that S. 13 does not contemplate an appeal to the High Court from a decree of the District Munsif's Court even though on a proper valuation of the suit tried by the District Munsif's Court, the subject-matter thereof would exceed Rs. 3000. On the other hand, the respondent contends that the combination of the provisions regarding appeals from decrees of Subordinate Judges and appeals from decrees of District Munsifs into a single clause providing that such appeal shall lie to the District Court except when the value of the subject-matter exceeds Rs. 5000, in which case the appeals should lie to the High Court, clearly contemplates the contingency of a decree by the District Munsif in a suit, the subject-matter of which exceeds the proper jurisdiction of that Court and in such a case if the subject-matter is more than Rs. 5000, under the plain provisions of S. 13, the appeal must lie to the High Court.

[3] In this connection, the provisions of S. 11, Suits Valuation Act are important. Clause 1 of that section provides that:

"an objection that by reason of the over-valuation or under-valuation of suit or appeal, a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal, exercised jurisdiction with respect thereto, shall not be entertained by an appellate Court, unless—

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, or

(b) the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or undervalued, and that the overvaluation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits."

Sub-section (2) provides that,

"if the objection was taken in the manner mentioned in cl. (a) of sub-s. (1) but the appellate Court is not satisfied as to both the matters mentioned in cl. (b) of that sub section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower appellate Court."

[4] Now, turning to the facts of the present case, it does not appear that there was any objection to the valuation of the suit in the trial Court. Objection was raised for the first time in the lower appellate Court, and it is contended for the petitioner that under such circumstances it was the duty of the appellate Court to proceed with the hearing of the appeal as if the trial Court had jurisdiction to entertain the suit, with the consequence that the appeal would lie to the Court which would have had jurisdiction on the basis of the valuation in the plaint. The petitioner relies strongly on the decision in

40 Mad. 1.[2] That was a case in which the District Munsif in a suit for accounts, the plaint of which valued the relief at less than Rs 5000, passed a decree for more than Rs 5000 and it was held that under S 13, Madras Civil Courts Act, the appeal from the District Munsif's decree lay to the District Court and not to the High Court In the order of reference the learned Judges pointed out that in every case when the Court is seized of jurisdiction it cannot and does not lose it by any change in the value of the subject-matter of the suit after the institution of the suit or by the precise ascertainment of its value in cases which do not admit of such ascertainment at the time of institution, except when the plaint is allowed to be amended In dealing with the question of the forum of appeal, they say,

"We think that the same simple rule should be

suit occur both in Ss 12 and 13 Civil Courts Act and the words should be given the same meaning in both the sections in the absence of any indication either from the context or otherwise that they were used in different senses"

[5] The learned Judges quote the dictum of Sir V. Bhashyam Aiyangar J, in 26 Mad 91,[3] that the theory of an appeal is that the suit is continued in the Court of appeal and reheard there They point out that the provision in the Court fees Act for the levying of additional fees on the plaint when the suit comes before the Court of appeal if that Court finds the suit has been undervalued, is based on the assumption that the value of the suit is the same in the original Court and in the Court of appeal They therefore conclude that reading Ss 12 and 13, Madras Civil Courts Act, together there can be no doubt that appeals from decrees of the District *Munsifs lie only to the District Court and* that the amount or value of the subject-matter of the suit, whether in the Court of appeal or in the trial Court, is the amount as fixed in plaint This view was accepted by the Full Bench and it is contended that on the authority of this case the fact that in the trial Court the suit was valued on a wrong basis so as to give jurisdiction to the District Munsif in a matter which should have been taken only by higher Court, will not alter the jurisdiction in appeal which will proceed on the footing of the valuation in the plaint In 46 Mad 631,[4] the question was whether by reason of the undervaluation of the suit which was instituted in the District Munsif's Court, though it should have been valued at more than Rs 5000 and instituted in the Court of the Subordinate Judge, the fact that the party was thereby deprived of the right of first appeal on facts to the High Court which was dealing with the matter in second appeal, can be deemed to affect prejudicially the disposal of the suit or appeal on the merits so as to fall within the terms of S 11, sub s. (2), Suits Valuation Act and to require the retrial of the suit by the proper Court The decision of the Full Bench was that there was no such prejudice. It seems clear that this decision proceeds on the assumption that the erroneous value of the subject-matter of the suit as fixed in the plaint will determine the forum of appeal Schwabe C J, states

"There is ample authority of this Court that the lower appellate Court in such a case not only has jurisdiction to hear the appeal from a District Munsif who has exceeded his jurisdiction but that it must do so unless it is satisfied as required by S 11, Suits Valuation Act first that the point was taken and secondly, that the decision on the merits was prejudi*cially affected*"

Coutts-Trotter J, as he then was, states

'I take it that the object of S 11, Suits Valuation Act is to provide a machinery for curing the original lack of jurisdiction in such circumstances If it does not do that, it does nothing else yet, it is argued before us that, if you once start a suit in one Court which decides on the merits, the section has no power to cure ... uncured ... gives you ... takes it ... low from ... sub-s 1 ... art', that ... uld have been started in the first instance but the Court to which it did in fact, go and ought to have gone if the lack of jurisdiction were to be condoned '

The other learned Judge agreed with this view It seems to us quite clear that the learned Judges in this decision took the same view as that which is found in the order of reference in 40 Mad 1[2] namely that reading Ss 12 and 13, Madras Civil Courts Act together when a suit is entertained by the District Munsif's Court on the basis of its own valuation, that valuation will determine the forum of the appeal and *nothing in S 13 of that Act will* justify the entertainment of an appeal by the High Court from the decision of the District Munsif's Court, even though on a correct valuation the suit should have been tried by the Court of the Subordinate Judge and the appeal *should have been laid to the High Court*

[6] In the light of these two Full Bench decisions, it seems unnecessary to look for further authority The respondent has quoted the decisions in 16 Mad 325[5] and 30 Mad 447,[6] both of which were anterior to the Full Bench *decision in 40 Mad 1[2] and are not referred to* in the judgement in that case We do not think it is necessary to consider these decisions in detail, for the decision in the later Full Bench case binds us. It has, however, been pointed out

S. 76 (c), T. P. Act, which provides that when, during the continuance of the mortgage, the mortgagee takes possession of the hypotheca, he must, in the absence of a contract to the contrary, out of the income of the property, pay all rent accruing due in respect of it. The section further provides that if the mortgagee fails to perform any of the duties imposed upon him by the section, he may when accounts are taken in pursuance of a decree made under the Chapter of the Act in which S. 76 is included, be debited with the loss if any, occasioned by such failure.

[5] It is now convenient to refer to the relevant provision of the Court-fees Act. That is S. 7 *(ix)* which enacts as follows:

> "In suits against a mortgagee for the recovery of the property mortgaged (the amount of fee payable shall be computed) according to the principal money expressed to be secured by the instrument of mortgage."

Notice of the present proceedings was given to the learnd Government Pleader since the present question arises under the Court-fees Act, and, in argument, he contended that the claim by the mortgagor in the suit is not entirely a claim contemplated by S. 7 *(ix)*, namely, a suit for the recovery of the property mortgaged. Consequently, he contended, that in regard to the assertion by the mortgagor that he is entitled to the Rs. 3000, the difference above mentioned, that is not a claim contemplated by clause *(ix)* and must be separately assessed with regard to court-fee.

[6] Several decisions of this Court have been cited which deal with the peculiar law applicable to the Malabar district and to mortgages cum leases of property in that area. In my opinion, those decisions are not in point and in the present instance reference to them is not necessary.

[7] When a mortgagor under a usufructuary mortgage wishes to terminate the existence of the mortgage, he is entitled to institute a suit for redemption. In that suit, upon a decree being passed, the Court as a rule, in the absence of admissions between the parties which make it unnecessary, directs an account or accounts to be taken to ascertain whether the mortgage debt has been discharged or, if not, how much remains, and for what sum, if any, the mortgagee, who has been in possession of the property is obliged to account to the mortgagor in respect of his stewardship, to ascertain any moneys which should be payable or credited to the mortgagor for any acts of waste committed by the mortgagee and also, in the event of the mortgagee failing to observe his duties set out in S. 76, T. P. Act, particularly as in this case, relating to his obligation to pay rent, the amount for which the mortgagee should account to the mortgagor. Not infrequently when an account is taken it is found that there are surplus profits derived the mortgagee from the estate, for which he bound to account to the mortgagor. When t account has been taken the decree directs redem tion. Such decree may also, if the circumstanc require, direct that the property shall be r conveyed to the mortgagor conditional upo his paying a specified sum to the mortgag or the decree may provide for the transf of the property by the mortgagee to the mor gagor and also payment to the mortgagor some stipulated sum.

[8] The question of the amount of court-fe and the principle on which it should be a certained in a suit for redemption has bee considered on two occasions by single Judges this Court in suits where the mortgagor wa asserting a right to obtain surplus profits, eithe stipulated sums or sums which would be re flected after accounts had been taken betwee the parties. These decisions are 60 M. L. J. 698[1] and 1940-2 M. L. J. 867.[2] In each of these cases, it was held that an additiona court-fee was not required; the provisions of S. 7 *(ix)*, Court-fees Act regarding a suit for re covery or redemption of mortgaged propert included claims or prayers for surplus profit In the course of his judgment, Abdur Rahman J in 1940-2 M. L. J. 867.[2] observed at page 869 a follows:

> "Since the main relief claimed by the plaintiff is on for redemption and her prayers for surplus profit or for accounts are only subservient to the main relie claimed by her and as the ascertainment of the amoun payable by one party to the other is a condition o redemption and is incidental thereto, the valuatio put by the plaintiff in her plaint is correct."

The valuation which the plaintiff had put wa the amount of the mortgage debt.

[9] I am unable to find any difference i principle between those two decisions and th present case. I would observe that, with respect I agree with the decisions expressed in both those cases. Since surplus profits which ar recived by a mortgagee and for which he has to account in a redemption suit are not the subject of a separate valuation but a redemption suit is subject only to court-fee ascertained by reference to the mortgage debt, I am unable to see why the same principle should not be applicable when, instead of surplus profits, there is what I will call, surplus deficiencies. The mortgagor in a redemption suit is entitled to claim the return of the mortgaged property. If as is alleged in the plaint in this suit, the mortgagee has occasioned by his default part of the mortgage property to be lost, then in fact the mortgagor will not recover back that part of the property; what he seeks to recover is what represents the lost property. Further, since the mortgagee

must account for surplus profits and also account in respect of loss which he has caused, surplus profits not being the subject of a separate court fee assessment I see no reason why surplus deficiency should be treated differently In my view, they should not be and they are not liable to a separate assessment

[10] In my opinion, the learned Judge in the lower Court was wrong in rejecting the plaint in the suit on the ground that insufficient court fee had been paid The order rejecting the plaint should be set aside this revision petition be allowed and the matter remanded back to the Subordinate Judge of Salem for him to accept the plaint and to act in accordance with this judgment The petitioner is entitled to his costs which will be paid by the Government

[11] Appeal No 434 of 1945 is also allowed Costs of that appeal will be costs in the suit Court fee paid on the memorandum of appeal will be refunded

**Rajamannar J.**—I agree

C R K /G B *Case remanded*

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## A I. R (34) 1947 Madras 413 *[C N 220]*

GOVINDARAJACHARI J

*In re Miyala Narasimhacharya and others —(Accused) Petitioners*

Criminal Revn Nos 268 to 271 and Cri Revn Petns Nos 261 to 264 of 1946 Decided on 7 2 1947 from order of Sessions Judge South Kanara D/ 4 3 1946

(a) Criminal P C (1898) S 350 (1) Proviso (a)—Commencement of proceedings, meaning of — Refusal to resummon witnesses whether fatal — Criminal P C (1898) S 537

[illegible]

of an ill witness there is no effective commencement of the proceeding and the Magistrate is not right in refusing the request of the accused to resummon [illegible]

[Para 3]

Cr P C —(46 Com) S 350 N 7, Pt 3 N 8

(b) Criminal P C (1898) S 439— Retrial—Long delay whether ground for refusal

Where a conviction is successfully impeached in revision on the ground of wrong refusal of a Magistrate to resummon witnesses under S 350 (1) Proviso (a) the accused is not entitled to rely on the delay between commission of the offence and his conviction as a ground for refusing to order retrial especially when he failed to apply for revising the wrong order 3 A I R 1916 Mad 110 *Disting* [Para 4]

Cr P C —(46 Com), S 439 N 25-a

*Case referred —*

1 (16) 39 Mad 527 3 A I R 1916 Mad 110 30 I C 145 (F B), Public Prosecutor v Kadri Koya

*V T Rangaswami Aiyangar D B Jagannath Rao, L S Raju G Gopalaswami and S Venkatachalam*—for Petitioners

*Public Prosecutor*—for the Crown

**Order** —The same point arises in these four criminal revision cases which can therefore be conveniently dealt with together Cri R C Nos. 268 269 270 and 271 of 1946 have arisen respectively out of C C Nos 138 139 140 and 142 of 1943 on the file of the Sub Divisional Magistrate Coondapur The sole accused in C C No 138 of 1943 is one Miyala Narasimhacharya who held two powers of attorney from the previous Swamiar of Sri Pejawar Mutt in Udipi who died on 16 10 1939 The accused is said to have continued in management of the affairs of the Mutt even thereafter It is alleged that he was entrusted with and was having dominion over certain gold jewels belonging to the said Mutt In C C No 139 of 1943 Narasimhacharya is accused 1 and accused 2 is a person who is described as his shanbhogue Narasimhacharya and a clerk are the accused in C C No 140 of 1943 The sole accused in C C No 142 of 1943 is a person who is described as a Kottari Narasimhacharya has been convicted under S 409, Penal Code Accused 2 in C C No 139 of 1943 and accused 2 in C C No 140 of 1943 have each been convicted in the alternative under S 409 read with S 109 Penal Code or under S. 411 Penal Code or under S 414 Penal Code The accused in C C No 142 of 1943 has been convicted under S 411 Penal Code or S 414 Penal Code All these convictions have been upheld by the Sessions Judge of South Kanara The offences in C C No 138 of 1943 are said to have been committed on or about 14 12 1938, 10 1 1939 and 4 9 1939 In C C No 139 of 1943 the offences are said to have been committed in or about September 1939 In C C No 140 of 1943 the offences are said to have been committed in or about December 1939 and in C C No 142 of 1943 the offences are said to have been committed on or about 17 5 1939, 4 9 1939 and 3 2 1940 It is unnecessary to refer to the sentences in any detail

[2] The cases were pending on the file of the Sub Divisional Magistrate Coondapur for a considerable time for the further cross-examination of P W 12 who was very ill and were being adjourned from time to time On 30-6-1945, the Magistrate adjourned the cases to 23 7 1945 for the same purpose but before 23-7-1945 the Magistrate who had heard the cases previously was transferred and another Magistrate was posted in his place The cases [illegible] to be adjourned [illegible] as P. W. 12 continued to be ill [illegible]

Criminal P. C., that all the prosecution witnesses might be resummoned and re-heard. The Magistrate however refused the request holding that if the accused desired to avail themselves of the right conferred by S. 350 (1) proviso (a), Criminal P. C., they should have applied on 12-7-1945 when the cases were called on before him or on any of the subsequent dates to which the cases were being re-posted. The trial proceeded resulting in convictions as already stated.

[3] It is argued by Mr. Rangaswami Aiyangar, Advocate for the petitioners in Cri. R. C. Nos. 268, 269 and 270 of 1946 that the accused were quite within their right in asking that the prosecution witnesses should be re-summoned and re-heard on 13-9-1945. This argument was adopted by Mr. Gopalaswami who appeared for the petitioner in Cri. R. C. No. 271 of 1946. Section 350 (1) and proviso (a) run as follows:

> "Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and recommence the inquiry or trial: Provided as follows: (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re summoned and re-heard."

The question that arises is whether the second Magistrate can be said to have commenced his proceedings at any date before 13-9-1945. The argument is that at no earlier date was there any effective commencement of the proceedings by him and that the cases were simply being adjourned from one date to another. There is direct authority in support of this argument in the judgment of Happell J. in Cri. R. C. No. 415 of 1944. The judgment of the learned Judge does not set out the facts of that case but it appears from the order of the Additional First Class Magistrate, Villupuram, which was revised by Happell J. that in that case too the accused was attending the Court on two occasions, 14-4-1944 and 21-4-1944, after the new Magistrate took charge and that the application for the resummoning and rehearing of the witnesses was made only on 9-5-1944. The learned Public Prosecutor admits that this is the only direct ruling on the matter. I respectfully agree with it, and, in my opinion, *commencement of proceedings* within the meaning of the proviso means an effective commencement of the proceedings and not a mere posting of the case from one date to another. In view of this defect of procedure which is not curable by S. 537, Criminal P. C., the convictions and sentences of all the petitioners in the several cases must be set aside.

[4] Mr. Rangaswami Aiyangar argued that in view of the long lapse of time between the dates of the several alleged offences and now, no retrial need be ordered. He referred to the case in 39 Mad. 527[1] as an instance where a Bench of this Court refused to order retrial while setting aside a conviction on the ground of illegality of procedure and also placed considerable reliance on what he regarded as the halting nature of the finding in the matter of the identity of the jewels. After giving the matter my best consideration, however, I think that a retrial should be ordered in the interests of justice. It would be noticed that notwithstanding that the offences are alleged to have been committed in 1938 and 1939 the cases were actually disposed of by the Sub-Divisional Magistrate, Coondapur, only on 29-12-1945. Moreover, it was open to the accused to have come up to this Court in revision against the order of the Magistrate dated 18-9-1945 refusing to re-summon and re-hear the prosecution witnesses and the matter would then have been immediately set right. They permitted the proceedings to go on, and I do not think they should be permitted to rely upon the delay that has taken place since then as a ground for refusing a re-trial. The circumstances in 39 Mad. 527[1] were essentially different, from those in the present cases. I do not consider it desirable to discuss the nature of the finding as to the identity of the jewels which Mr. Rangaswami Aiyangar characterised as a halting finding but which the learned Public Prosecutor claims as all that could possibly be given in the circumstances.

[5] The convictions and sentences are therefore set aside, and the cases are directed to be retried.

C.R.K./K.S. *Retrial ordered.*

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## A. I. R. (34) 1947 Madras 414 *[C. N. 221.]*

KUPPUSWAMI AIYAR J.

*V. Venkatasami Chetty — Appellant v. D. Panchakshara Reddy and others — Respondents.*

Second Appeals Nos. 710 and 711 of 1945, Decided on 28-8-1946, against decrees of Dist. Judge, Chittoor, in A. S. Nos. 129 and 145 of 1943.

Contract Act (1872), S. 63—Remission of part of debt—Validity.

A remission of a debt *in presenti* whether in whole or in part, which is not a mere promise to remit in the future, is valid and does not require consideration. [Para 2]

Accounts were taken between the creditor and debtor and it was agreed then that a certain amount was to be paid and that the balance payable was only Rs. 1500 after remitting a certain amount, the words used being "the amount excused out of grace is . . . .' The creditor brought a suit claiming the entire amount including the amount remitted, on the ground that it was only an agreement to remit and was invalid as it was not supported by consideration.

*Held* that the language clearly indicated that the remiss on was *in presenti* though in part and was val d

181 *Rel on* 26 A I R 1939 Mad 688 and 16 A I R 1929 Mad 794 *Disting* [Para 2]

*Cases referred —*

1 (39) 26 A I R 1939 Mad 688 187 I C 338

Banerjee

*S A Seshadri Ayyengar and G Ranal nga Peddi* — for Appellant

*K Subba Rao* — for Re pondents

**Judgment** —The only point for decis on in these appeals is whether the remission of the entire amount due except Rs 1500 granted by the agreement evidenced by Ex D 3 is invalid and cannot be claimed under S 63 Contract Act unless the balance of the amount payable had also been paid and the contract itself had been wiped out These two appeals arise out of two suits on two promi sory notes The plaintiff in both is the same The defendants are different The promissory notes were executed for money due under prior dealings Interest was payable under the promissory notes The defendants case is that on 16 6 1942 accounts were taken and it was agreed then that a certain amount should be paid and that the balance payable was only Rs 1500 and that it should be paid on 30 6 1942 The question was whether the amount cited as having been remitted in Ex D 3 was not validly remitted and whether the plaintiff was entitled to eschew that remission and claim the entire amount The question was considered with reference to S 63 Contract Act The first Court held that since the entire debt was not discharged but there was a promise to remit and a promise to remit cannot be valid and the entire amount was therefore decreed On appeal the district Judge of Chittoor held that there was a valid remission and that under S. 63 there could be a remiss on of the entire debt that in t is case there had been a val d remission to that extent and that the plaintiff is not entitled to claim the amount already remitted

[2] It is urged before me that this is only a case of a promise to remit and not a case of actual remission and that therefore on the principle of the deci on in A I R 1939 Mad 688 [1] the remission is not valid I have sent for the records in the suit in which that ruling was given and it is clear from the records that what was pleaded there was not an actual remission but an agreement to remit The decision in 53 Mad 12 applied to the facts of that case as it was a case of an agreement to remit In I L R (1943) 1 Cal 101 [3] which is relied upon by the d strict Judge is the case which applies to the facts of this case Where there is a remission whether the remission is in whole or in part and is not a mere promise to remit in the future if it is *in presenti* then it will be valid and does not require consideration The decision in A I R 1939 Mad 688 [1] cannot govern this case because on the facts of that case there was only an agreement to remit in the future But in this case in Ex D 3 it is definitely stated

The balance due i Rs 5300 2 11 out of wh ch the amount excused out of grace is Rs 3809 2 11 the [illegible]

The language clearly ind cates that to the extent to which there was a remission out of grace it was a remission *in presenti* The words used were in the past tense the amount excused is so and so and under S 63 Contract Act there could be a remis ion in part as well If as contended for the appellant a remiss on like this must be followed by payment of the balance [illegible]

not think it could be said that the language of S 63 warrants this construction I therefore find that the learned D strict Judge was justified in finding that there was a remission *in presenti* at the time of Ex D 3 and therefore it was valid even though it was not supported by consideration by reason of S 63 Contract Act The appeals accordingly fail and are dismissed with costs (No leave)

C R K /G N *Appeals dismissed*

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**A I R (34) 1947 Madras 415 [C N 222]**

**YAHYA ALI J**

*Thirumalayandi Thevar — Petitioner v Uthanda Thevar — Respondent*

Civil Revn Petn No 1502 of 1945 Decided on 27 3 1946 from order of Dist. Munsif, [illegible], D 1 11 1945

*Court fees Act (1870) S 7 (iv A) (Mad) — S [illegible] deed — Suit for specific declaration of invalidity of such instrument and for possession.

A plaintiff who had been a party [illegible] su t praying expressly [illegible] for a decla[illegible] that the deed in question was [illegible] val d in law and for possession [illegible] The plaintiff s case was [illegible] of the documen [illegible] stand [illegible] stated tha he had [illegible] as a [illegible] defendant was [illegible] cal possession of the property [illegible]

*Held* that far from treating the prayer for declaration as a mere superfluous prayer, the plaint showed that that was in substance as well as in effect the main if not virtually the sole relief that he wanted the Court to grant, and therefore S. 7 (iv-A) governed the case: *Case law referred.* [Para 13]

('44-Com ) Court-fees Act, S. 7 (iv) (c) N. 5 Pt. 18.

*Cases referred:—*

1. ('07) 34 Cal. 320: 34 I. A. 87 (P.C.), Bijoy Gopal v. Krishna Mahishi.
2. ('08) 35 Cal. 551 : 35 I. A. 98 (P.C.), Pethaperumal Chetti v. Muniandi Servai.
3. ('24) 48 Bom. 166 : 11 A. I. R. 1924 Bom. 174 : 82 I. C. 533, Sangawa v. Huchan Gowda.
4. ('29) 16 A. I. R. 1929 Mad. 478 : 120 I. C. 378, Krishnaswami Aiyanger v. Kuppu Ammal.
5. ('91) 14 Mad. 26, Unni v. Kunchi Amma.
6. ('20) 55 I. C. 766 : 7 A. I. R. 1920 Mad. 88, Swami Natha Ayyar v. Rukmani Ammal.
7. ('29) 56 M. L. J. 891 : 16 A. I. R. 1929 Mad. 896 : 119 I. C. 35, Kattiya Pillai v. Ramaswami Pillai.
8. ('40) I. L. R. (1940) Mad. 78: 26 A. I. R. 1939 Mad. 894 : 189 I. C 801, Velayya v. Ramaswami.
9. ('24) 19 M. L. W. 249 : 11 A. I. R. 1924 Mad. 611 : 78 I. C 118, Chathu Kutty Nair v. Chathu Kutti Nair.
10. ('40) I. L. R. (1940) Mad. 259 : 27 A. I. R. 1940 Mad. 113 : 186 I. C. 494 (F.B.), Ramaswami Aiyangar v. Rangachariar.
11. ('44) 1944-1 M. L. J. 497 : 31 A. I. R. 1944 Mad 408, Adinarayana v. Rattamma.
12. ('05) 28 Mad. 319, Singaruppa v. Sanjivappa.
13. ('45) 1945-2 M. L. J. 582 : 33 A. I. R 1946 Mad. 181, Ramanujam Pillai v. Ramaswami Pillai.

*A. Swaminatha Ayyar* — for Petitioner.

*Government Pleader and G. R. Jagadisa Ayyar* — for Respondent.

**Order.**— This revision petition raises the question of court-fee payable on the plaint brought by the petitioner herein in O. S. No. 60 of 1945 in the District Munsif's Court, Tenkasi. The learned District Munsif held that the relief prayed for by the plaintiff fell in substance under S. (7-iv-A), Court-fees Act and that consequently court-fee should be paid on the actual market value of the properties affected by the sale deed dated 16-12-1942, in respect of which a declaration was asked for in the plaint. The petitioner's contention is that in view of the position taken by him that the said sale deed was a sham and nominal transaction and hence inoperative, the provisions of S. (7-iv A), Court-fees Act were not attracted. The question is which view is correct.

[2] One Thirumalayandi Thevar was the owner of the plaint mentioned properties. He had two daughters Sundarathammal and Achi Ammal. The former had two sons, the plaintiff and his younger brother Vellaiyappa Thevar. The latter had one daughter, Ramayee alias Ramathal After the death of Tirumalaiyandi Thevar (senior), the property passed to the daughters and for the purpose of convenient enjoyment they seem to have divided it into two shares and enjoyed each her share separately. On 13-5-1940 Ramathal the daughter of Achi Ammal who was in possession of her mother's share executed a deed of settlement in favour of three persons. Vellayyappa Thevar filed O. S. No. 6 of 1941, Sub-Court, Tinnevelly to set aside the aforesaid deed of settlement executed by Ramathal as being invalid and inoperative. While that suit was under contemplation, a *document of transfer was taken from the plaintiff* of his half share in the properties which were in the possession of Achi Ammal's daughter. This transfer was found to be inoperative being a transfer of mere *spes successionis* and eventually a decree was passed in O. S. No. 6 of 1941 in favour of both the plaintiff therein Vellaiyappa Thevar and his elder brother the plaintiff in the present case. In this state of affairs, another transfer was executed by the plaintiff on 16-12-1942 for Rs. 1000 in favour of the defendant in the present action conveying to the latter the plaintiff's interest in the said property, i. e., the share that was being enjoyed by Ramathal. It is to avoid that sale and to obtain a declaration that the same was sham and nominal and never intended to be acted upon and not valid in law that the present suit was instituted by the plaintiff. In para. 8 of the plaint *it is urged that he executed the sale deed* and had it registered, that he received no consideration whatever for the sale deed and that it was only a sham and nominal transaction. He explains that because the first sale dated 16-5-1940 was executed for Rs 1000, the latter transfer of 16-12-1942 was also executed for the same amount. Although the document recites that cash consideration was paid, the recital is not true and was made only for the sake of formality. It is further averred that the plaintiff did not receive from the defendant Rs. 600 for the expenses of O. S. No. 6 of 1941 or any amount for family expenses or for making jewels. He remained *ex parte* in the prior suit. In para 9, again, it is said that the sale deed was not executed with the idea that it should be operative and take effect and that the defendant has not acquired any interest in the suit property through the said document. The following passage in that paragraph is significant:

> "At the time of sale deed the properties were not in the possession of the plaintiff. Upto this date he has not got possession. The defendant had also no possession till the filing of the plaint."

In para. 11 the plaintiff states that the defendant was making "terrible attempts for the past one month to establish his interest," in the suit properties and then adds "If the sale deed executed by the plaintiff were allowed to remain with the defendant the plaintiff apprehends much injury." Parapraph 11-a which seems to have been subsequently added says as follows:

As the defendant had obtained delivery of pos [illegible] Tinne [illegible] d pro- [illegible] ict the [illegible] sion of the propert [illegible] (symbolica [illegible] dant the [illegible] tion in futi [illegible]

Paragraph 12 says that the cause of action arose on 16 12 1942 the date of the execution of the sale deed and November 1944 when the defendant claimed interest in the suit property The prayer is couched in these words in para 15

Therefore it is prayed that the Court may be pleased (a) to declare the sale deed as regards the undermentioned properties executed on 16 12 1942 by the plaintiff in favour of the defendant is a benami one that it was a sham and nominal transaction that it was never intended to be acted upon and that it is not valid in law (b) to direct delivery of possession of the properties from the defendant to the plaintiff as a consequential relief (c) to decree that the costs of the suit may be paid by the defendant and (d) for such other reliefs

The main contention of Mr A Swaminatha Aiyar for the petitioner is that the prayer for declaration with reference to the sale deed dated 16 12 1942 is superfluous and unnecessary and hence it is not essential for the plaintiff to get the sale deed cancelled or set aside for obtaining the relief regarding possession of the properties The learned Government Pleader urges that in the plaint as framed, the main relief that is required is the declaration touching the sale in question and possession is asked for merely by way of caution and as an incidental or consequential relief Numerous decisions have been cited on both sides In view however of the existence in this case of two features in combination which appear to me to decisively negative the petitioner s contention it may not be necessary to deal exhaustively with long series of cases cited at the Bar Those features are (1) that the plaintiff himself was a party to the sale deed which he now impugns as being sham nominal and inoperative and (2) that he has expressly and specifically asked in the plaint for a declaration that the said deed of sale is for the reasons mentioned by him not valid in law In none of the cases brought to my notice I find that both these features were together present On that ground alone it will be sufficient to hold that this case is distinguishable from the various decisions relied upon by the petitioner

[3] Section 7 (iv A), Madras Court Fees Act is as follows

In a suit for cancellation of a decree for money or other property having a money value or other document securing money or other property having such value according to the value of the subject matter of the suit and such value shall be deemed to be if the whole decree or other document is sought to be cancelled the amount or value of the property for which the decree was passed or the other document executed If a part of the decree or other document is sought to be cancelled such part of the amount or value of the property

Article 91 Limitation Act provides a period of three years for suits for the cancellation or setting aside of an instrument not otherwise provided for commencing from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him Section 39, Specific Relief Act also deals with the cancellation of documents and runs thus

Any person against whom a written instrument is void or voidable who has reasonable apprehension that such instrument if left outstanding may cause him serious injury may sue to have it adjudged void or voidable and the Court may in its discretion so adjudge it and order it to be delivered up and cancelled

It is evidently having the language of this provision in view that the plaintiff stated in para 11 of his plaint as already mentioned that if the sale deed executed by the plaintiff was allowed to remain with the defendant the plaintiff apprehended much injury It may be further noticed that S 39 Specific Relief Act covers both void and voidable documents and as contended by the learned Government Pleader S 7 (iv A), Court fees Act is not by its language confined to cancellation of voidable documents only Even a plaint asking for cancellation of a document which is void *ab initio* for the reason that it is benami or sham or nominal would fall within the ambit of S 7 (iv A) It is for this reason that the learned advocate for the petitioners argued that even if he has asked expressly for the setting aside or cancellation of a document of this nature such relief being really unnecessary and superfluous according to the various decisions on which he relied, the particular relief should be altogether ignored for court fee purposes and the plaint should be stamped according to the valuation of the main relief sought by him apart from the relief concerning the nature of the document

[4] In 34 Cal 329[1] which was a suit by Hindu reversioners impeaching certain alienations made by the widow, the plaintiffs had specifically asked for a declaration that the ijara in dispute had become inoperative after a certain point of time and asked for possession on that basis. The question that arose before the Privy Council was whether upon such averments the period of limitation that applied was the one provided under Art 91 of Sch 2, Limitation Act or the usual 12 years period provided by Art. 141 It was held that it was unnecessary to ask for a declaration that the ijara was inoperative This was in the view that a Hindu widow is not a tenant for life but the owner of her husband s property subject to certain restrictions as to alienation and subject to its devolving upon her husband s heirs upon her death. She is competent

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to alienate it subject to certain conditions although it is voidable at the election of the reversionary heir. A reversionary heir may either affirm it or treat it as a nullity without the intervention of any Court and if he has manifested his election by the overt act of commencing an action to recover possession of the property, there is no call upon the Court to cancel or set aside the alienation as a condition precedent to the right of action of the reversionary heir awarded to him under the personal law and it is open to him to ignore the alienation and sue straightway for the recovery of the property. Their Lordships however stated this :

"It is true that the appellants prayed by their plaint a declaration that the ijara was inoperative as against them, as leading upto their prayer of delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances, which they relied on, for showing that the ijara or any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs."

Eventually their Lordships held that the Article that was applicable was 141 and not Art. 91.

[5] In 35 Cal. 551[2] again the question arose before the Judicial Committee whether Art. 91 was the appropriate provision to apply or Art. 141. The instrument in that case was alleged to have been brought into existence to defeat and defraud a creditor, and being benami was said to be inoperative in effect. The suit was to recover possession and there was no prayer for a declaration that the document was inoperative. The only objection raised was that as a preliminary to the relief for possession, the plaintiff had to set aside or cancel the document and that the suit would be barred under Art. 91. It was held that it was unnecessary for the plaintiff to have it set aside as a preliminary to the obtaining of the relief that he claimed, since the deed had been held by the Courts in India as being inoperative and ineffective which finding their Lordships accepted as binding upon them. With reference to both these decisions, the point of distinction that is noticeable is that in both the plaintiff was not a party to the impugned document and in 35 Cal. 551[2] there was no declaration asked for that the document was inoperative. The document was merely ignored and possession was claimed. It must however, be mentioned that although in 35 Cal. 551[2] the plaintiff was not a party to the document that was questioned, he claimed that his brother was a party to the same.

[6] In 48 Bom. 166[3] which was a suit to recover possession of lands, a sale by the plaintiff's husband was impugned as a paper transaction not intended to be operative having been vitiated by misrepresentation and fraud. It was found that the sale that was attacked was an inoperative transaction and it did not require to be set aside before granting to the plaintiff the relief of possession. It was also held that Art. 144 applied to the case. In this case also it has to be noticed that the plaintiff was not a party to the document sought to be set aside and there was no declaration asked for concerning the imperative nature of the sale deed.

[7] In A. I. R. 1929 Mad. 478[4] decided by Curgenven J. the relief claimed was a declaration of the plaintiff's title to certain property and an injunction to restrain the defendants from interfering with his possession. A settlement deed that had been executed by the plaintiff's maternal grandfather in favour of the grand-daughters was impugned as a mere fictitious or sham transaction contrived as a defence against a maintenance claim and no property was intended to pass thereunder. The learned Judge held that the plaintiff was not in those circumstances obliged to have the settlement set aside before becoming entitled to the other reliefs and that the appropriate provision of the Court-fees Act to be applied was S. 7 (iv) (c). Reference was made in this judgment *inter alia* to 14 Mad. 26[5] relating to recovery of property alienated by the karnavan of a Malabar tarwad and to the Privy Council decision in 35 Cal. 551[2] already referred to and the latter was held to conclude the question. The decisions in 48 Bom. 166[3] and 55 I. C. 766[6] were also adverted to. The decision largely turned upon the question whether there was a real or actual transfer however voidable. If there was no real transfer but it was only a fictitious arrangement, it was not necessary to set it aside. If however the transfer was merely voidable, the learned Judge would have thought it necessary to get it set aside before giving any further relief. With regard to this case also, it must be observed that the plaintiff was not a party to the transfer and there was no declaration asked for to set aside the deed that was questioned. All that was prayed for was a declaration of title to the property in suit.

[8] In 56 M. L. J. 394[7] there was a will, executed by the plaintiff's father in favour of the plaintiff's brothers, defendants 1 and 2. The plaintiff sued expressly for a declaration that the will was a forgery and for its cancellation and also for the cancellation of the registration of the will by the Sub-Registrar. He alleged that he and another brother defendant 3 were in actual possession of the property. Venkatasubba Rao J., referred to S. 39, Specific Relief Act and pointed out that that provision did not contemplate that the plaintiff should himself ask for the cancellation and delivering up of the instrument and that it would be suffi-

cient if the plaintiff asked that it should be adjudged void or voidable. He said that it was the function of the Court to order that it should be delivered up and cancelled and, if it was registered, to send a copy of its decree to the Registrar who should note on the copy of the instrument contained in his books the fact of its cancellation In this view, the learned Judge held that the prayer relating to cancellation was unnecessary and superfluous and that it was not obligatory on the plaintiff to have the will set aside, that therefore Art 91 did not apply but the ordinary 12 years period governed the case With regard to the court fees payable it was found that Art. 17 A (1) of the Court fees Act was applicable and not S 7 (iv) (c) Thus it would be seen that the suit was treated virtually as a suit for a declaration alone where no consequential relief was prayed and not a suit for a declaratory decree, where consequential relief was required The second point of distinction is that in this case also the document that was in dispute was not executed by the plaintiff

[9] The next case that I would refer to is the decision of Wadsworth J in I L R (1940) Mad 73[8] That was a suit by a creditor under S 53, T P Act for a declaration that an alienation made by the debtor was void against the creditors and the question was whether it was a suit for cancellation of a document under S 7 (ivA), Court fees Act or a suit where no consequential relief was prayed falling under Art 17 A It was held that the case fell under Art 17 A The learned Judge was at pains to point out that in cases under S 53, T. P Act the relief asked for is a declaration that the sale is not binding upon the creditors to the extent of their debts and not a prayer for the cancellation of the instrument of alienation, because not being a party thereto, the plaintiff cannot ask for its being cancelled. This aspect was effectively brought out in a clear distinction that the learned Judge drew between the two sets of cases The first set is one where the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party and the second set of cases is where the plaintiff is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, and he is not in a position to get that decree or that deed cancelled in toto It was pointed out that in the former class of cases he must get a declartion that the decree is void in toto, and whatever actual relief may be that he asked for, his suit is in substance a suit for the cancellation of the decree or deed even though it is framed as a suit for a declaration. In the latter category of cases, the proper remedy would be in order to clear the way to establish his title to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed This distinction, it was pointed out, was made clear in 14 Mad 26[5] and in 19 M L W 249[9] In that case (I L R (1940) Mad 73[8]) also neither was the plaintiff a party to the impugned document nor was a declaration or cancellation of the said document asked for

[10] Next is the Full Bench decision of this Court in I.L.R (1940) Mad 259[10] That was a suit for partition by an undivided member of a joint Hindu family *inter alia* questioning the alienation made by the father, there was no prayer for declaration or cancellation of the instruments, the prayer asked for being an account of the movable and immovable joint family properties and partition by metes and bounds of the plaintiff's one fifth share The main question there was whether Art. 17 B, Court-fees Act, applied or S 7 (v) or S 7 (iv)(b) With regard to certain decrees passed against the plaintiff in suits in which he had been *eo nomine* impleaded as a party, however, it was held that the fee prescribed under S 7 (ivA) would have to be paid, that such decrees were binding on him until set aside, and that therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them It was further observed that the plaintiff must be held to have impliedly asked for a cancellation of the decrees passed against him and must accordingly stamp his plaint *ad valorem* on the amount of the decrees and not merely on his share fraction, as his liability is for the full amount, though necessarily limited to the extent of his share in the joint family assets. There were certain other deeds to which he appears to have been made a party by his father and with regard to them the Full Bench held by a majority.

> "that the plaintiff could not be required to pay separate court-fee as regards any of them even though he had impleaded the several creditors or alienees and even if the plaint had contained prayers for declarations or cancellations in respect of the said transactions."

The last mentioned dictum was based on the observations of the Privy Council in 34 Cal 329[1] which I have already adverted to in brief in the earlier portion of this judgment After setting out the relevant passage, the learned Chief Justice said:

> "In such cases even if the plaint contains a prayer for a declaration or cancellation, there is good reason for holding it to be one for a purely incidental, but unnecessary relief As I have indicated there is no such

prayer in the plaint and in the light of the principles explained there is no justification for implying them and then demanding a fee for it."

From the last quotation it is clear that no prayer was contained in the plaint for a declaration or cancellation with regard to the alienations to which the plaintiff was *co nomine* a party, and that the decision on this point rested on the consideration that under the substantive law by which the plaintiff was governed, he was not bound to sue for a declaration or cancellation in respect of any of those transactions. Reliance was placed by the Full Bench on 14 Mad. 26[5] where the following words, which were taken from an unreported decision of this Court occur :

"If a person not having authority to execute a deed or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it, to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist."

[11] (1944) 1 M.L.J. 497[11] decided by Horwill J. was a case where the transaction was impugned as sham, nominal and inoperative and of no legal effect. It was alleged to have been executed nominally for the purpose of screening the donor's property from his creditors. The donor was subsequently dispossessed of this property and he sued for a declaration that in spite of the gift deed executed by him in favour of the first wife, he was still the owner and was entitled to a decree for possession. The question was whether it was a suit for a declaration and consequential relief or in substance a suit for the cancellation of the gift deed. The learned Judge held that S. 7 (ivA) did not apply and that it was a suit where a declaration was asked for with consequential relief. Here, though the plaintiff was a party to the questioned document, he did not specifically ask it to be declared that the document was sham or nominal and of no effect against him. He asked for a declaration of his title to the property and for possession. The learned Judge examined a number of cases that were cited before him most of which have already been adverted to in this judgment. Referring to a decision in 28 Mad. 349[12] which is relied upon by the Government Pleader, the learned Judge remarked :

"There, the deed with which the learned Judges were concerned, was alleged to be a sham sale deed in favour of the defendants ; and the question was one of limitation. The learned Judges held that the suit had to be brought within three years from the date when the plaintiff apprehended that the defendants hadset up title under the instrument; but that was a case in which the plaintiff specifically asked to have the deed cancelled ; and the learned Judges need not consider whether it was necessary for the plaintiff to pray for the cancellation of the document. Moreover, the matter did not arise, because the suit was held to be within time. *If a plaintiff sues for a declaration, he would have to pay court-fees under S. 7 (ivA) Court-fees Act, whether it was necessary to have, the deed cancelled or not.*"

The last sentence underlined (here italicized) by me very clearly indicates that even apart from the question whether the particular relief is necessary or not, it is open to a party even to seek unnecessary reliefs; and if he has chosen to ask for a particular declaration touching the validity and binding nature of a document, he will have to pay court-fees under S. 7 (ivA). This is as stated in 14 Mad. 26[5] on the principle of removing a cloud on the plaintiff's title and peventing further litigation. Horwill J. referred to the decision of Wadsworth J. in I. L. R. (1940) Mad. 73[8] and the distinction that he drew between the two classes of cases that have been already set out by me. With reference to the two categories of cases, the learned Judge pointed out that although the statement of the law as stated by Wadsworth J. was correct in all cases of decrees and with regard to voidable deeds, there is an exception to the general rule with regard to deeds which are intended to be inoperative and with reference to such documents unless the plaintiff expressly sued for a declaration even though he was a party to it, it was open to him to ignore the same and seek substantive relief against the property itself.

[12] Lastly reference was made to a decision of mine in 1945-2 M. L. J. 582[13] where I followed the decision of Horwill J. In that case the plaintiff was not a party to the impugned document and no declaration was asked for concerning the document. That arose out of a suit by a mortgagee who contended that certain prior transactions between the defendant and third parties were nominal and never intended to be given effect to and were not binding on the mortgagee-plaintiff.

[13] As I have already stated in none of the cases referred to above was it held that where as in the present case the plaintiff himself was a party to a deed and where he specifically prayed in the plaint for a declaration that the deed in question was a benami one and that it was sham and nominal and was not valid in law, the plaint could be treated as merely for possession of the property, the relief asked touching the document being altogether ignored for court-fee purposes. The plaintiff's case as set out in the plaint is that it is essential to get rid of the document as if the sale deed should be allowed to stand, much injury would result to him. He also states that upto the date of the suit the properties were not in the plaintiff's possession nor were they in the defendant's possession. He further states that he has asked for possession more or less as a matter of formality since the defen-

dant has obtained symbolical possession of the property through the Court He definitely states that he claims possession as a consequential relief although the defendant has not obtained actual possession of the properties in fact the very cause of action is based upon the execution of the deed and the only substantial relief that is asked for is that the obstruction caused by his sale deed dated 16 12 1942 should be removed from his way Far from treating the prayer for declaration as a mere unnecessary or superfluous prayer or as a surplusage the plaint shows that that is in substance as well as in effect the main if not virtually the sole relief that he wants the Court to grant I agree with the conclusion of the learned District Munsif that S 7 (ivA) governs the case and that court fee should be paid on the actual market value of the property affected by the sale deed dated 16 12 1942 The civil revision petition is dismissed with costs (one set)

O R K./V B B *Petition dismissed*

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## A I R (34) 1947 Madras 421 [C. N 223]

SOMAYYA AND RAJAMANNAR JJ

*R M L Natarajan Chettiar (deceased) and another — Appellants v A L A R Rm Vellayan Chettiar (deceased) and others —Respondents*

Appeal No 123 of 1942 Decided on 17 7 1946 against decree of Sub Judge, Devakottah in O S No 19 of 1940

Madras Estates Land Act (1[I] of 1908) Ss 3 (16) (a) 20 and 21 —Tank and tank bund—Use for purpose not intended

The subject matter of the suit to set aside the order passed by the Collector under Ss 20 and 21 was an *oorani* or a tank In the plaint it was alleged that the *oorani* the bund and the land all round the *oorani* were the private and absolute properties of the plaintiff and his family All that the plaintiff proved was that the members of the plaintiff's family were treated by the authorities as Inukdars or the trustees of the tank

*Held* that on the evidence as it stood the land in question was a tank and tank bund set apart for the common use of the villagers for drinking water and that it answered the description contained in S 3 (16) (a) The erection of the shops and sheds there by lessees of the plaintiff affected the quality of the water and [illegible]

[illegible]

*N Sivaramakrishna Ayyar*—for Appellants
*K Parasurama Ayyar*—for Respondents

Somayya J — This is an appeal filed by defendant 2 against the decree of the lower Court dismissing the suit which was one to set aside an order passed by the Collector under Ss 20 and 21, Madras Estates Land Act. The subject matter of the suit is an oorani or a tank [illegible] is now admitted to be intended exclusively for the villagers to take drinking water from In the plaint it was alleged that the oorani or the tank, the bund and the land all round the oorani were the private and absolute properties of the plaintiffs and of defendants 2 and 3

[2] A petition was filed in 1937 before the Collector for action under Ss 20 (1) and 21 Under S 20 (1) the Collector is empowered on the application of the landholder or other person interested, to decide any question as to whether any land is or is not of the description mentioned in sub cls (a), (b) or (c) of cl (16) of S 3 Section 3, cl (16) defines ryoti land to mean cultivable land in an estate other than private land and it does not include (a) beds and bunds of tank and of supply, drainage surplus or irrigation channels We are not concerned with (b) and (c) of cl (16) of S 3 If a particular land in an estate is a tank, then it comes under cl (16) (a) so do the bed and the bunds of the tank Section 20 (1) also empowers the Collector 'to decide any question to the customary rights in the user of any land which is of any such description as existing at the commencement of the Act' Under this part of S 20 (1), the Collector is empowered to decide as to the customary rights in the user of the tank and the tank bund Under S 21 any person occupying any of the lands mentioned in sub-cls. (a) and (b) of cl. (16) of S 3 for any purpose other than that for which they are so set apart can be evicted by the Collector in the manner provided by the Madras Land Encroachment Act if such user commenced not more than [illegible] years before the date of the suit In the [illegible] case the complaint before the Collector [illegible] contrary to the purpose for which th[illegible] set apart the appellant and the m[illegible] family allowed several pe[illegible] shops and sheds It was alle[illegible] of these shops and shed[illegible] water unfit for drink[illegible] agreed with these cont[illegible] enquiry and held the [illegible] wered the descript[illegible] villagers were c[illegible] vely for tak[illegible] that the tank [illegible] that the [illegible] tank [illegible]

[illegible]

2 and 3 in the lower Court. Defendant 2 who is one of the members of the plaintiffs' family has preferred this appeal. He is entitled to prefer the appeal, being a person having a common interest with the plaintiffs in the action.

[3] Dealing with the merits of the appeal we are of opinion that there is no substance in the claim that the property in question is the private and absolute property of the appellant and his family. The plaint started with saying that the tank was constructed by an ancestor of theirs called Karuthan. As the lower Court has pointed out, there is no reliable evidence, oral or documentary, in proof of this contention. No doubt it is not possible to expect direct evidence; but the lower Court has given sufficient reasons to come to the conclusion which it did. In particular we may refer to one point made by the lower Court that in an earlier litigation of 1916 the then members of the plaintiffs' family never even stated that the tank itself was constructed by an ancestor of theirs. No reference was made to Karuthan who is said to have been the ancestor and the person who constructed the tank. All that we have in this case is that from 1902 or thereabouts, the authorities and, in one or two instances, the members of the contesting defendants' family, treated members of the plaintiffs' family as the hukdars or the trustees of the tank. The expression 'hukdars" used in some of the documents does not seem to indicate anything more than mere persons who were in management of the affairs of the tank. It is unnecessary to refer to the various documents in detail because the effect of it is well summarised in the judgment of the lower Court, and it has not been suggested to us that there is any document in which the plaintiffs are referred to as the owners of the tank or in which the tank was referred to as the private property of the plaintiffs. That the villagers have been using this tank for taking water for drinking purposes is not challenged before us and it cannot be challenged on the evidence as it stands. We agree with the lower Court that the land in question is a tank and tank bund set apart for the common use of the villagers and that it answers the description contained in S. 3, cl. (16) (a), Madras Estates Land Act.

[4] As pointed out by the lower Court, it is clear that the erection of the shops and sheds must necessarily affect the quality of the water in the tank and there is no doubt therefore that the erection of these buildings amounts to putting the land to a purpose other than that for which it was intended. We may also remark that the lessees of the shops and sheds against whom there was an order of eviction made by the Collector have not been even made parties to the present suit and they have not chosen to challenge the correctness of the order made by the Collector. It is only the plaintiffs and defendants 2 and 3 that challenged the correctness of the lower Court and their main ground is that the property is their absolute property. That claim is found against and on the finding that the user for the last 15 years or so is contrary to the purpose for which it was intended, the order of eviction upheld by the lower Court against the plaintiffs and defendants 2 and 3 must also stand. If the plaintiffs had honestly come forward with the case that they were trustees of this oorani, then things might have been possibly different, but as it is, we are unable to do anything more than maintain the decree of the lower Court. The appeal fails and is dismissed with costs.

C.R.K./D.H. *Appeal dismissed.*

## A. I. R. (34) 1947 Madras 422 [C. N. 224.]

RAJAMANNAR J.

*Ponnusami Chettiar — Petitioner* v. *Kailasam Chettiar — Respondent.*

Civil Revn. Petn. No. 434 of 1946, Decided on 10-4-1947, to revise decree of Dist. Munsif, Kulitalai, D/- 22-11-1945.

Evidence Act (1872), S. 58 — Unstamped document—Admission of execution—Necessity of proof —Stamp Act (1899), S. 35.

When the fact of an execution of a document is admitted it need not be proved and this would be so even when the document in question is not admissible on account of any provision of the Stamp Act : 19 A. I. R. 1932 Mad. 693, *Foll.* [Para 5]

('45-Com.) Stamp Act, S. 35, N. 11, Pt. 1a.

*Case referred :—*

1. ('32) 63 M.L.J. 303: 19 A.I.R. 1932 Mad. 693 : 139 I. C. 486, Alimana Sahiba v. Subbarayudu.

*M. S. Vaidhyanatha Iyer* — for Petitioner.
*N. Suryanarayana* — for Respondent.

**Order.**—The plaintiff in S. C. S. No. 61 of 1945 on the file of the Dstrict Munsif's Court, Kulitalai, applies to revise the order of the learned District Munsif dismissing his suit brought for recovery of Rs. 209-8-0 from the respondent. The respondent borrowed from one Nallvangalammal a sum of Rs. 100 on 2-5-1940 and a sum of Rs. 90 on 24-7-1940 agreeing to pay the amounts with interest at six per cent. per annum. Nallvangalammal died and the plaintiff claimed to be her heir and though this fact was not admitted, it is not necessary any longer to deal with this objection because the plaintiff obtained a succession certificate in respect of the suit claim.

[2] In the plaint it was alleged that these two loans were evidenced by two documents described as hand-letters. They were admittedly unstamped. It appears that before the trial stamp duty and penalty were levied by the Court on the footing that they were bonds.

[3] The defendant admitted the execution of the two documents but pleaded that in substitution of his liability under them he had executed a promissory note on 29 4 1944 and had made payments towards the promissory note and there was only a sum of Rs 40 still payable for the principal of the loans and interest

[4] At the trial neither party let in any evidence The defendant apparently gave up his plea in defence the onus of establishing which certainly lay on him but the defendant raised the contention that the suit was not sustainable on the two documents because they were inadmissible in evidence for any purpose as they were unstamped The learned District Munsif agreed with this contention and dismissed the suit.

[5] It is not necessary for me to decide as to the exact nature of these two documents to determine whether they are admissible in evidence Assuming that these two documents should not have been legally admitted in evidence nevertheless it is contended for the petitioner by Mr M S Vaidhyanatha Aiyar and I agree with his contention that as the defendant had admitted the execution of the documents and had only pleaded a substitution of liability by the execution of another promissory note and a partial discharge towards it there was no necessity for the plaintiff to adduce proof of his claim by seeking to get the two documents admitted in evidence In other words the plaintiff will be entitled to a decree on the failure of the defendant to make out the plea set up by him in defence. The contention of the petitioner is supported by the observations of Ananthakrishna Aiyar J in 63 M L J 303[1] at p 308 with which I respectfully agree The learned Judge therein points out after referring to the provisions of S 58 Evidence Act *that when the fact of an execution of a* document is admitted it need not be proved and this would be so even when the document in question is not admissible on account of any provision of the Stamp Act

[6] I therefore set aside the decree of the learned District Munsif dismissing the suit. There will be a decree in favour of the plaintiff for the amount claimed with costs The petitioner will also be entitled to costs in this revision petition from the respondent

C R.K./V R *Decree set aside*

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## A I R (34) 1947 Madras 423 *(C N 225)*

YAHYA ALI J

*Kuppuswami Padayachi — Petitioner v Jagadambal — Respondent*

Criminal Revn No 147 and Crl Revn Petn No 141 of 1946 Decided on 9 9 1946, from order of Sub-Divisional Magistrate Ariyalur D 23 1 1946

**Criminal P C (1898) S 488—Order for maintenance — Parties living together subsequently — Order ceases to be operative and is not revived on subsequent separation or neglect on part of husband —Fresh application under S 488 is necessary**

*When once after the passing of an order of maintenance under S 488 the husband and wife have resumed cohabitation the order becomes automatically ineffective and unenforceable No formal cancellation of that*

(46 Com) Cr P C S 488 N 24 Pts 7 and 11

*Cases referred —*

1 (42) I L R (1912) Mad 24 23 A I R 1912

Munuswami Pillai v Doraikannu

*N Suryanarayana — for Petitioner*

*G Gopalaswami and Venkatachalam — for Respondent.*

**Order** — This is an application to revise an order made by the Sub Divisional Magistrate of Ariyalur dismissing an application under S 489, Criminal P C, filed by the petitioner for cancellation of an order of maintenance that had been passed in M C No 40 of 1944 In M C No 40 of 1944 the petitioner was directed to pay maintenance to his wife who was the petitioner in that petition and who is the respondent here A revision application was filed against that order and when that application came up for hearing in this Court on 5 2 1945 it was represented by the petitioner that the case had been compromised The respondent's advocate then *mentioned to the Court that he had not heard* about it and he took time to verify the information On 7 2 1945 it was reported by both parties that the husband and wife had resumed cohabitation and on that ground the petition was not pressed and was eventually dismissed No specific orders were however then passed regarding the order of maintenance which had been passed in M C No 40 of 1944 It would appear that as reported then to this Court the respondent rejoined the petitioner and lived together according to the petitioner for six months Subsequently, however on account of differences that arose again the respondent left the petitioner's house and claimed the maintenance awarded in M C No. 40 of 1944 to be continued That occasioned the filing of the application under S 489 Criminal P C by the petitioner, for the cancellation of the maintenance order The learned Magistrate dismissed that petition on grounds which appears to me to be wholly un

[2] It is unnecessary to canvass those grounds as the matter is covered by direct authority. It was held by the learned Chief Justice and Mockett J. in I. L. R. (1942) Mad. 24[1] that a decree obtained by a Hindu wife against her husband for maintenance becomes annulled by reason of subsequent resumption of cohabitation and is not merely suspended during such period of resumption. The learned Chief Justice in his judgment reviewed the Indian as well as the English precedents on the question of alimony and held that by returning to her husband the wife became disentitled to claim maintenance against him and the decree which she had obtained must be regarded in the circumstances as having become ineffective. It was observed that by going back to her husband the wife restored the position to what it was when they were married. In dealing with the repercussion of this principle on the provisions of the Indian Criminal Procedure Code the learned Chief Justice stated that he could see no difference in principle between an order passed under S. 488 of that Code and an order under the Matrimonial Causes Act, 1878, or the English Summary Jurisdiction (Married Women) Act 1895. He pointed out that if the principle stated by Lord Elden in (1813) 3 E. R. 684[2] was to be applied, there can be no question of the suspension of the order; the order goes entirely. Mockett J., in concurring with this view pointed out that the view taken by Curgenven J. in 50 Mad. 663[3] was not in conformity with the well-settled principles. The learned Chief Justice also referred to this decision of Curgenven J. and said that the decision ran directly counter to the principle embodied in the judgment in (1887) 18 Q. B. D. 778[4]. The position thus is that when once after the passing of an order of maintenance under S. 488 the husband and wife have resumed cohabitation, the order becomes automatically ineffective and unenforceable. No formal cancellation of that order appears to be necessary. If therefore there was neglect or refusal on the part of the husband subsequently, that would furnish a ground for the wife to make a fresh application, but she would not be entitled to claim the payment of maintenance on the strength of the order passed before the resumption of cohabitation. This principle was followed in and applied to a criminal case under S. 488 by Kuppuswami Aiyar J. in 58 M. L. W. 570.[5] There the learned Judge emphasised that the joint living should have been resumed as husband and wife. The facts of that case were peculiar. The husband in that case brought the wife by a ruse into his house only to get over the order of maintenance that had been passed against him and never lived with her thereafter, but lived in a separate house with his concubine. The wife was attended to, if at all, by the husband's mother and she was made to do some menial work in the house. In those circumstances the learned Judge was of the opinion that such conduct did not amount to resumption of joint living and cohabitation. The facts of the present case are entirely different and there is evidence that for a period of six months the petitioner and the respondent lived as husband and wife after the order of dismissal was passed by this Court in Cri. R. C. No. 874 of 1944. Following the Bench decision. I must hold that the maintenance order passed in M. C. No. 40 of 1944 ceased to be effective automatically on the resumption of cohabitation between the petitioner and the respondent and that learned Magistrate ought in those circumstances to have cancelled the order when an application was made under S. 489 seeing that an attempt was being made by the respondent to enforce the order.

[3] In the result the petition is allowed and the application made by the petitioner under S. 489 is granted and the order of maintenance passed in M. C. No. 40 of 1944 against him in favour of the respondent is cancelled.

C.R.K./K.S. *Petition allowed.*

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## A. I. R. (34) 1947 Madras 424 *[C. N. 226.]*

HORWILL J.

*A. K. Ramakrishna Ayyar — Petitioner* v. *P. Bargavi Amma and others—Respondents.*

Civil Revn. Petn. No. 935 of 1945, Decided on 24-10-1946, from order of Dist. Munsif, Ottapalam, D/- 31-3-1945.

Transfer of Property Act (1882), Ss. 105 and 100 — Charge for rent — Possession after term fixed — Applicability of charge.

In a rental agreement, it was stipulated that it was for a year and that the rent specified "shall be paid for the year 1111 onwards every season before the 30th Makaram" and it further provided that "for the balance of rent and interest, the equity of redemption over and above the mortgage for Rs. 1165, our other properties and ourselves are liable." The plaintiff contended that the latter sentence created a charge also for the arrears of rent due for the period subsequent to the period of one year stipulated and not for that one year's rent alone:

*Held*, that though the lease was only for one year the words in the lease contemplated the tenancy continuing beyond the year of lease on the same terms and the charge therefore extended to the entire rent due including that for the priod beyond the year of lease: 13 A. I. R.1926 Mad. 1061, *Disting.* [Para 3]

('45-Com.) T. P. Act, S. 105, N. 29.

*Cases referred :—*

1. ('35) 58 Mad. 75 : 21 A. I. R. 1934 Mad. 458 : 155 I. C. 838, Gnanadesikam Pillai v. A. B. Boopalarayar.
2. ('01) 11 M. L. J. 186, Kutti Umma v. Madhara Menon.
3. ('26) 93 I. C. 20 : 13 A. I. R. 1926 Mad. 398, Rama Vadhyar v. Krishna Nair.

4 (12) 16 I C 560 (Mad) Mambati Pattiyeth v Cheria Uthalamma
5 (26) 51 M L J 378 13 A I R 1926 Mad 1061 97 I C 941 Tarvad karnavan v Abdul Rahman

*C K Viswanatha Aiyar*—for Petitioner
*C S Swaminathan*—for Respondents

**Order** —The rental agreement was executed by the respondents in favour of the petitioner for a period of one year from the 30th Makaram 1111 The particulars of the pattom were set out and the rent payable calculated to be Rs 28 The deed then contains this important sentence

'This sum of Rs 28 shall be paid for the year 1111 onwards every season before the 30th Makaram and your receipt obtained therefor and if the arrears of rent are allowed they shall be paid with interest at 12 per cent per annum

This sentence is relied upon by the petitioner as

[illegible]

wed by one roughly to this purport We shall surrender possession at our own expense after the 30th Makaram 1112" Then comes a sentence which imposes a charge and is in these words '

For the balance of rent and interest the equity of redemption over and above the mortgage for Rs 1165 our other properties and ourselves are liable and we agree to your taking surrender of the properties

The question is whether this sentence creates a charge for the arrears of rent only for the year which is stated in the early part of the document to be the period of the lease or also for the subsequent years during which the respondents remained in possession The lower Court purporting to follow 59 Mad 75[1] held that there was no charge beyond the period of the lease and that the suit was therefore barred by limitation altogether as the suit claim did not relate to any period within three years of the filing of the suit

[2] 59 Mad 75[1] was largely a decision on the particular facts of that case as they appeared from a study of the two relevant documents Reference is however made therein to 11 M L J 190[2] The learned advocate for the respondents relies also on two other cases in which it was held that when a document creates a charge, the charge is only for the rent due during the period of the lease They are 93 I C 20[3] and 16 I C 560[4] following 11 M L J 190[2] The ratio decidendi was that after the expiry of the term of the lease the tenant was only holding over and was not in possession allowing rent under the lease The rent was then due under an implied contract implied by the conduct of the tenant in tendering rent and of the landlord in accepting it The rent was therefore not due under the registered document and no charge [illegible] fore be created

[3] I agree with the learned advocate for the respondents that Ex P 8 the rental agreement, is for a period of one year and not for an indefinite period On the face of it, the document states that it is for a period of one year and near the end of the document we find the sentence already set out viz 'We shall surrender possession at our own expense after the 30th Makaram 1112' This case therefore differs from that in 51 M L J 378[5] in which the learned Judges found upon a reading of the document as a whole that despite the initial recital that the lease was for one year it was really for an indefinite period The sentence This sum of Rs 28 shall be paid from the year 1111 onwards every season before the 30th Makaram seems merely to make provision for the possibility that after the year had expired the tenant would continue on the same terms and does not have the effect of extending the period of the lease beyond one year I do not however think that this interpretation would have the effect of restricting the charge to the rent due during the year of lease The documents referred to in the cases relied on by the respondents do not contain a sentence of this kind 'For the balance of rent and interest our other properties and ourselves are liable This sentence refers to the total amount of rent referred to in 'This sum of Rs 28 shall be paid from the year 1111 onwards every season , and so on a plain reading of the [illegible]

That means that the petitioner's claim is not barred by limitation

[4] The petition is allowed and [illegible] in the lower Court decreed as prayed [illegible] The petitioner is entitled to his costs [illegible] Court

C R K /K S [illegible]

**A. I R (34) 1947 [illegible]**

YAHYA [illegible]

*Mrs Gr[illegible]*

*Louis Titus*—[illegible]

[illegible]

Criminal P. C. On an application filed under this section, it is the duty of the Court to consider whether a decision of the Civil Court leads to the consequence that the order passed by the Criminal Court under S. 488, should be cancelled or varied. There is no question of his considering whether the decision of the Civil Court has altered the circumstances of the case as the Magistrate has found. For the purpose of S. 489 (2), the Criminal Court should take the decision as it stands and consider the necessary effect of it upon the order passed by the Criminal Court. If the consequence is that it should be varied or cancelled, effect must be given to it by cancelling the order or varying it accordingly. The discretion that is given in that sub-section to the Criminal Court is only for this limited purpose. In this case, the Magistrate has taken upon himself to completely ignore the decision of the Civil Court and has not chosen to consider whether in consequence of that decision his order should be cancelled or varied. That he was not competent to do.

[2] The learned District Judge has found that the alleged adultery of the wife with Alphonso was not proved to be true by any cogent or reliable evidence and consequently he dismissed the suit that had been brought by the husband impleading her and the said Alphonso as the co-respondent. The only consequence of this decision is that the order passed by the Magistrate in M. C. No. 32 of 1944 cancelling the maintenance allowance that had been granted to the petitioner in the prior proceedings in M. C. Nos. 13 of 1943 and 17 of 1944 should have no effect and the prior orders granting her maintenance should be restored.

[3] The petition is allowed and the maintenance granted to the petitioner in M. C. Nos. 13 of 1943 and 17 of 1944 will be restored. The restoration will take effect as from the date when she filed M. C. No. 11 of 1946 in the Court of the Joint Magistrate, Coonoor, having regard to the principle contained in the proviso to S. 488(3), Criminal P. C.

C.R.K./V.B.B. *Petition allowed.*

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**A. I. R. (34) 1947 Madras 426** *[C. N. 228.]*

YAHYA ALI J.

*Yella Papayya—Appellant* v. *Yella Suryanarayana minor by mother and next friend Ammanna — Respondent.*

Second Appeal No. 604 of 1945, Decided on 26-3-1946, against decree of Sub-Judge, Ammalapuram, D/- 19.9-1944.

**(a) Hindu law—Partition—Evidence of—Absence of document evidencing partition — Parties living separately for considerable time — Cumulative effect of all documents produced should be taken into account.**

In ascertaining whether a partition had actually been effected or not in a case where there was no document evidencing the partition and the parties had for a considerable time been living separately and enjoying the properties belonging to them separately it is the cumulative effect of all the documents produced as evidencing their conduct that should be taken into account and not each document separately : 31 All. 412 (P. C.), *Foll.* [Para 3]

**(b) Civil P. C. (1908), S. 100 — Question of law —Legal inference from proved facts or soundness of conclusion drawn therefrom is a question of law.**

Where the inference is a legal inference arising from facts, the proper effect thereof is a question of law : 14 A. I. R. 1927 P. C. 102, *Ref.* [Para 4]

Where, without questioning the facts found the soundness of the conclusions from them is in question it is a matter of law : 20 Cal. 93 (P. C.), *Rel. on.* [Para 4]

Consequently the conclusions to be drawn from documents as to whether a partition was effected or not is a question of law and can be interfered with in second appeal. [Para 4]

('44-Com.) Civil P. C., Ss. 100-101, N. 28, pt. 8.

*Cases referred :—*

1. ('09) 31 All. 412 : 3 I. C. 195 : 36 I. A. 71 (P. C.), Parbati v. Naunihal Singh.
2. ('34) 57 Mad. 652 : 21 A. I. R. 1934 P. C. 112 : 61 I. A. 163 : 148 I. C. 778 (P. C.), Secretary of State v. Rameswaram Devastanam.
3. ('30) 11 Lah. 199 : 17 A. I. R. 1930 P. C. 91 : 57 I. A. 86 : 122 I. C. 316 (P. C.), Wali Muhammad v. Mohamed Baksh.
4. ('27) 8 Lah. 573 : 14 A. I. R. 1927 P. C. 102 : 8 Lah. 573: 54 I. A. 178: 101 I. C. 355 (P. C.), Dhanna Mal v. Motisagar.
5. ('93) 20 Cal. 93 : 19 I. A. 228 (P. C.), Ramgopal v. Shamshkaton.

*V. Viyyanna* — for Appellant.
*V. Parthasarathy*—for Respondent.

**Judgment.**—The facts leading to this second appeal are these : Venkanna and Pattayya were two brothers who were at one time joint. They seem to have settled down in different villages, Venkanna in Medicharlapalam and Pattayya in Mattapparru and they were each of them enjoying in his village the potter service inam lands and rendering service pertaining to that office. Pattayya died about 1920 and Venkanna who survived him died about 1934. In spite of Pattayya's death and Venkanna becoming the head of the family, it would appear that there was no disturbance of any kind in the occupation and enjoyment of the property belonging to Pattayya by his widow and son, at Mattapparru. The plaintiff is Venkanna's son and the defendant is Pattayya's son. The present suit was filed by the plaintiff's next friend on 29-11-1941 alleging that the family continues to remain joint and that both the Mattapparru and Medicharlapalam properties should be partitioned in equal shares between the plaintiff and the defendant.

[2] The defendant contested the suit averring that there had been a partition 40 years ago and that each branch had lived separately in different villages enjoying their separate properties

rforming potter's service each in his own The learned District Munsif accepted the ant's contention and dismissed the plain uit The lower appellate Court however eal reversed that decree and holding that mily still remained joint, granted a pre ry decree for partition. The defendant pealed against that decree of the Sub inate Judge

[3] A considerable amount of documentary evidence was put in on behalf of the appellant There is, to start with the fact that the defen-

family and assume management in respect of the Mattapparru property. Then there is the fact that taxes were paid separately by each branch in respect of the properties in the respective villages One did not pay taxes for the lands in the other's villages There was, further, separate cultivation of the property and separate enjoyment Water applications were made by the defendant in his own name to the authorities and orders were issued to him Land encroachment notices were served upon the defendant in his own name The defendant dealt with the properties as belonging to him individually by mortgaging it on several occasions Exhibit D 3 was a mortgage of that kind dated 22 9 1935 Exhibit D 4 is another mortgage dated 8 7-1937 and Ex D 6 is an usufructuary mortgage executed by the defendant. The learned District Munsif took into account all these factors and in a short, but neat judgment discussed them and came to the conclusion that although there was no deed of partition to evidence the actual par-

father and the defendant's father and that the properties were subsequently enjoyed by the plaintiff and the defendant separately in their own individual rights The learned Subordinate Judge approached the question altogether from an erroneous point of view. He took up each document separately and found with regard to each of them that it was not conclusive in nature. This scrutiny was on the basis that each of those documents was genuine In the end however he made a surprising statement to the effect that the defendant had been cooking up the documents from 1931 thereby casting a doubt on the genuineness of the entire series of documents beginning from Exs D-2 to D-11 including most of the tax receipts comprised in Ex D 1 series. This was nobody's case Even the plaintiff did not and could not possibly have questioned the genuineness or authenticity of these documents which are all either public or registered documents in the nature of tax receipts, notices under the Madras Survey and Boundaries Act, registered mortgage deeds and proceedings of the executive Engineer In dealing with the oral evidence the learned Subordinate Judge while at one place completely discrediting the testimony of D W. 2 who merely stated that he cultivated some land under the defendant, ultimately agreed that it was quite possible that D W 2 had cultivated the land Mr Vijyanna, the learned Advocate for the appellant, has rightly stressed that the learned Subordinate Judge was wrong in not taking all the documentary evidence and the several factors, established thereby in their combined effect into account and his way of dealing with the case by examining each document or each circumstance separately and holding that it was not conclusive was not correct I agree with that contention As stated by the Privy Council in 31 ALL 412[1] the cumulative effect of all the documents should be taken into account in ascertaining whether in such circumstances a partition had actually been effected. Their Lordships said

"It is unnecessary to examine all the other docu-

erroneous method They apparently only considered whether each document was by itself sufficient to rebut the *prima facie* presumption that, as the plaintiff's family were admittedly a joint Hindu family before 1861, it continued to be joint, and omitted to take into account the cumulative effect of all these documents "

These remarks are quite apposite to the facts and circumstances of the present case. I have no doubt whatever that for failure of a correct approach, the learned Subordinate Judge has arrived at a conclusion which is not warranted by the evidence and the circumstances established in the case. If all the various facts adverted to above are taken into account *in cumulo* the only possible inference is that even during the lifetime of Venkanna and Pattaya, there was a partition between them and that subsequently each branch settled down in different villages and attended to the performance of potter's service in their own right and enjoyed the property belonging to them separately. In these circumstances the learned District Munsif was right in drawing the inference that a partition had taken place and that the property in Mattaparru which was in the possession of the defendant was his own separate property and was not in the nature of joint family property in which the plaintiff could claim a share.

[4] Learned [illegible]

contends that the finding of the learned Subordinate Judge is in the nature of a finding of fact and that in second appeal the same should not be disturbed, and he relies on 57 Mad. 652.[2] All that that case laid down, relying on 11 Lah. 199[3] was that where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials have to be construed for the purpose of deciding the question. There is no such instrument in this case which is in the nature of merely a historical material or document upon which no title is founded. On the other hand there are clear dicta of the Privy Council in other cases holding that where the inference is a legal inference arising from facts, the proper effect thereof is a question of law. In 8 Lah 573[4] their Lordships stated:

"Now their Lordships would be the last to seek to abridge the effect of Ss. 100 and 101, Civil P. C., or weaken the strict rule that on second appeal the appellate Court is bound by the finding of fact of the Court below. They are well aware moreover, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a provid fact is a question of law and the question whether a tenancy is permanent or precarious seems to them, in a case like the present to be a legal inference from facts and not itself a question of fact."

It is well settled that when in the appraisement of facts and in the process of drawing an inference therefrom a legal principle has been or is to be applied, there is a question of law involved. As stated by the Privy Council as early as the decision in 20 Cal 93[5] the facts found need not be questioned but it is the soundness of the conclusions from them that is in question and that is a matter of law.

[5] The appeal is therefore allowed with costs here and in the lower appellate Court and the judgment and decree of the lower appellate Court are reversed and the judgment and decree of the District Munsif of Razole are restored. (Leave refused.)

C.R.K./K.S. *Appeal allowed.*

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## A. I. R. (34) 1947 Madras 428 *[C. N. 229.]*

YAHYA ALI J.

*Public Prosecutor, Madras—Appellant* v. *Parameswara Aiyar—Respondent.*

Criminal Appeal No. 27 of 1947, Decided on 28-3-1947 from order of Second Class Sub-Magistrate, Periakulam, D/- 16-8-1946.

Madras Prevention of Adulteration Act (3 (III) of 1918), S. 20—Madras Prevention of Adulteration Rules (1932), R. 28-B (as amended in 1946) and R. 29—Sale of jilebi adulterated with fat.

Where a person sells "jilebi" which is adulterated with fat not derived from milk or cream and no notice is published in manner prescribed by R. 28-B, ghee being an ingredient of the sweetmeat, the person must be held to have committed an offence under R. 28-B read with R. 29: 33. A. I. R. 1946 Mad. 44, *Not foll.* [Para 3]

*Case referred :—*

1. ('46) 33 A. I. R. 1946 Mad. 44 : I. L. R. (1946) Mad. 514 : 223 I. C. 118, Crown Prosecutor, Madras v. Ramanathan Aiyar.

*The Appellant in person.*
*C. A. Md. Ibrahim*—for Respondent.

**Judgment.**—This is an appeal by the Public Prosecutor against the acquittal of the respondent in C. C. No. 1318 of 1946 on the file of the Stationary Sub-Magistrate of Periakulam. The respondent was charged with having in his possession and having sold "jilebi" which was adulterated with 20 per cent. of fat not derived from milk or cream.

[2] Rule 28-B of the Rules framed under S. 20, Madras Prevention of Adulteration Act provides that where in any hotel, sweetmeats of which ghee is commonly an ingredient are for sale and are prepared wholly or in part with a mixture with other articles contemplated in R. 28 or with any oil or fat other than ghee, it is imperative upon the person in charge of the hotel to exhibit in such hotel one or more notices specifying in the vernacular of the district that sweetmeats are not made of ghee. An infringement of this rule entails punishment under R. 29.

[3] It has been found as a fact that in the present case the "jilebi" seized contained ghee with 20 per cent. of fat. The evidence of P. W. 2 shows that no notice was published in the manner prescribed by R. 28-B to the effect that the "jilebi" was not prepared in ghee. The Sub-Magistrate acquitted the accused, acting upon the decision of this Court in A. I. R. 1946 Mad. 44,[1] where it was held that the ghee or oil or other fatty substance used for frying a sweetmeat is not an ingredient of sweetmeat. That was a case of "jahangiri" which is not materially different from "jilebi." If that decision had been in force, the acquittal awarded by the Magistrate would be perfectly correct. But to get over the effect of the decision of the Bench, the Provincial Government have altered the rule and have brought in an amendment which has been published in the Fort St. George Gazette dated 15-1-1946 (G. O. No. 3097, dated 30-11-1945 Education and Public Health Department), whereby they have enacted that when a sweetmeat is fried or otherwise cooked in ghee, such ghee, for the purpose of R. 28-B shall be deemed to be an ingredient of the sweetmeat. This notification came into force on 15-1-1946. The offence, the subject-matter of this prosecution, was on the 25-2-1946. In consequence of the amended rule, it must be held that an offence has been committed under R. 28-B read with R. 29.

[4] The order of acquittal is set aside and the accused is convicted under the rules and sentenced to pay a fine of Rs 25

C R.K/V R.B *Order set aside*

## A I R (34) 1947 Madras 429 (C N 230)

HAPPELL J

*Pavayammal and another — Petitioners v District Board, Salem — Respondent*

Criminal Revn No 133 and Cri Revn Petn No 132 of 1945 Decided on 27 4 1945 against judgment of the Stationary Sub-Magistrate, Ras puram, in C C S No 1095 of 1944

Madras Local Boards Act (14 [XIV] of 1920) S 223—Applicability—Continuing offence—Starting point for limitation —Madras Local Boards Act S 207 (1) and (2)

The proviso to S 223 indicates that the starting point of limitation for a continuing offence will be the last date on which the offence is committed unless specific provision is made to a contrary effect 17 A I R 1930 Bom 340, *Not approved* [Para 3]

The accused were convicted on 11 3 1944 under S 164 (2) read with S 207 (1) of the Act on the ground that they had failed to vacate certain property in contravention of the notice served on them by the District Board The accused continued in possession of the property even after their conviction Nearly six months after the conviction the Board filed a complaint on 2-9 1944 under S 207 (2)

*Held* that as the accused were prosecuted for failing to vacate the property in spite of notice under S 164 (2) there was no question of prosecution for failure to obtain permission for the encroachment and therefore the 12 months limitation as prescribed by the proviso to S 223 had no application. [Para 3]

*Held futher* that the offence under S 207 (2) being a continuing offence the complaint was not barred by the three months limitation prescribed by S 223 [Para 3 and 4]

*Cases referred* —

1 (30) 17 A I R 1930 Bom 340 127 I C 181, Bechardas Narotamdas v Emperor

2 (1900) 1 Q B 324 69 L J Q B 114 82 L T 262 Welsh v West Ham Corporation

*D Ramaswami Ayyangar* — for Petitioners
*Public Prosecutor* — for the Crown
*Basheer Ahmed Sayeed* — for Respondent

**Order** — The Salem District Board was entrusted with the management of a choultry and the property with which the choultry was endowed On the ground that the petitioners had unauthorisedly occupied a portion of the property attached to the choultry, the District Board served them with a notice to vacate and then prosecute them under S 164 (2) read with S 207 (1), Madras Local Boards Act on the ground that they had failed to vacate the land in contravention of the notice served on them The petitioners were convicted on 11 3 1944 but still did not vacate the property and some six months later on 2 9 1944 the District Board prosecuted them under S. 207, sub-s (2) of the Act It appears that there is a civil suit pending between the District Board and the petitioners in regard to the title to the property in question but this suit was filed after the conviction in the first case, and an undertaking which the Board seems to have given not to evict the petitioners during the pendency of the suit was admittedly given after the accused had been convicted in the case out of which this petition arises The civil proceedings are, therefore, not material

[2] Section 207, sub s (2) provides that, if a person, after conviction continues to contravene the provision of the Act in respect of which he has been convicted or to neglect to comply with the direction or requisition, he shall on conviction be punished, for each day after the previous date of conviction during which he continues so to offend, with fine which may extend to the amount mentioned in col. 4 of the Schedule It is not disputed that the petitioners after their conviction for the contravention of the notice requiring them to vacate, have continued in possession of the property Section 223 Local Boards Act however, provides that no person shall be tried for any offence against the provisions of the Act unless complaint is made within three months of the commission of the offence. In the present case, the complaint was filed nearly six months after the conviction and so more than five months have elapsed, at any rate, from the commencement of the offence The contention advanced for the petitioners is that the complaint against them is barred by limitation by virtue of the provisions of S 223 of the Act. There is a proviso to S 223 by virtue of which a different period of limitation is prescribed for complaints based on failure to take out a licence or obtain permission under the Act Such failure is deemed to be a continuing offence

> until the expiration of the period if any, for which the licence or permission is required, and if no period is specified complaint may be made at any time within twelve months from the commencement of the offence.'

[3] It is argued for the District Board—an argument that was accepted by the Magistrate—as against the contention that the complaint was barred by limitation because it was brought more than three months after the conviction, that the present case falls within the scope of the proviso as an encroachment can be validated with the permission of the District Board On the basis of this contention, it is argued that, as no period is specified for the permission, it was open to the Board to make the complaint any time within twelve months of the commencement of the offence, i e, the date of the conviction This contention, in my opinion has no substance The petitioners were prosecuted for failing to vacate the property in spite of the fact that a notice under S 164, sub-s (2) of the Act had been . . on them. There

by the District Munsif's Court, Nellore. This petition is therefore incompetent and is hereby dismissed."

The District Judge is thus saying that while he would have made an order simpliciter for retransfer of the decree, yet he could not allow a substantive execution application which E. P. No. 15 of 1945 was in form.

[2] Counsel for the appellant has cited a number of cases in support of his contention that although a decree may have been transferred for execution to another Court, the decree-holder nevertheless can always present an execution petition to the Court which passed the decree. He contends therefore that despite the fact that the decree in the present case had been transferred to the District Munsif and was still in his Court and that no certificate had been returned in accordance with S. 41 of the Code of Civil Procedure, yet the District Judge was competent to entertain it and ought to have entertained it in the fullest possible way as an execution petition.

[3] He has cited a number of cases in Madras, viz, 39 Mad. 640[1] 63 M. L. J. 788[2] and 42 Mad. 821[3] which support the view, which indeed we think to be well settled, that an application may always be made to the Court which passed the decree for an order retransferring it if it has been transferred elsewhere and that such an application is a step-in-aid of execution and prevents limitation running against the decree-holder. The first sentence therefore of the District Judge is correct.

[4] The further question whether the District Court can execute the decree although the decree is in fact in the custody of another Court for execution, is not however to be answered in the appellants' favour upon the cases which have been cited to us. Three cases may be mentioned at once which at first sight are somewhat in favour of the appellants' contention. The first is 1936 A. L. J. 277[4]. There a decree had been transferred for execution against certain property to a Court other than the Court which passed the decree and the property was attached in that other Court. Nevertheless, the decree-holder applied to the decreeing Court for execution by arrest of the judgment-debtor. It was held that while the law was well settled that execution against the same property cannot take place in two Courts at one and the same time, there is, however, no bar to execution in one Court against the immovable property and in another Court by other means. In 53 Bom. 844,[5] a single Judge held that the Court which passes a decree has jurisdiction to pass orders in execution proceedings notwithstanding that the decree has been transferred for execution to another Court. An analysis of the learned Judge's reasoning however leads one to the view that the proposition which he intends to lay down is not quite as wide as expressed above and that his decision goes no further than saying that because a decreeing Court has made an order of transfer it has not thereby deprived itself entirely of jurisdiction in respect of the decree which it has itself passed. Reliance was placed on A. I. R. 1935 Lah. 465,[6] a Full Bench case, in which the material question which was asked was

"When a money decree has been transferred by the Court which passed it for execution to another Court, is an application to the first Court (a) to execute the decree, (b) to transfer it to another Court for execution and (c) to transfer it for execution to the same Court, not a valid application unless the proceedings taken in the other Court have first been reported and certified by the Court?".

In a lengthy judgment, it was decided that it was a valid application and was a step-in-aid of execution so as to save limitation. By a majority it was held that even without a certificate by the Court to which the decree has been transferred, nevertheless the transferring Court could consider an application for retransfer and could presumably therefore grant the application which in this particular case had been made to it. It is, however, quite clear from the judgment in this case that not until the end of the arguments did it become known to the Court that the application which it was considering was an application not only for retransfer but also for execution. It appears to us, reading the judgment, that the arguments were based mainly on the application for transfer, and were in the main directed to the question whether or not, as such, it was a step-in-aid of execution.

[5] An earlier case in the same High Court A. I. R. 1934 Lah. 728,[7] which appears to deal directly with the point now before us, was not accepted by the majority of the Full Bench, but it seems to us, with great respect, to be preferable. In this case it was held that,

"Where a decree is transferred for execution, the original Court is not wholly divested of its jurisdiction but can still retransfer the proceedings to itself or to some other Court. Where, however, a decree is transferred for execution without any limitation, the original Court has no longer the power to execute the decree until and unless the decree is returned by the transferee Court with a certificate of non-satisfaction."

Reference is made in the judgment to A. I. R. 1933 Cal. 906,[8] where the same view was expressed after considering the Privy Council decision in A. I. R. 1916 P. C. 16.[1] In 37 Mad. 231,[9] it was held that:

"a Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under S. 41, Civil P. C., to the Court

on 3rd September 1942 and not earlier. In any event the burden was on the railway company to prove the date of the loss [Para 31]

(42 Com.) Lim. Act, Art. 30, N. 7

*Cases referred —*

1 (1894) 1 Ch. 293 : 63 L. J. Ch. 469 : 70 L. T. 52, Hole v. Chard Union
2 (1861) 30 L. J. C. P. 305 : 4 L. T. 177 : 9 W. R. [illegible]
3 [illegible] B. 378 : 120
4 [illegible] 8 W. R. 665, Emblen v. Myers
5 (1861) 30 L. J. C. P. 273 : 4 L. T. 293 : 9 W. R. 612, Bell v. Midland Railway Co.

*R. S. Dabir* — for Appellant

*K. V. Tambay and W. K. Sheorey* — for Respondent

Judgment [illegible]

[illegible] sula Railway Administration. The suit is for damages, and the claim can be divided into two parts. In one part, the plaintiff seeks compensation for injury caused to a portion of certain consignments of cotton seed bags which the plaintiff made over to the defendant. The other relates to damages for loss of the remaining portion of those consignments. The facts are as follows.

[2] On 28-4-1942 the plaintiff handed over 800 bags of cotton seed to the Station Master at Khamgaon railway station for despatch to Rewari. This consignment was accepted by the railway authorities and registered. On 16-5-1942 a second consignment of 850 bags was handed over at Khamgaon for despatch to New Delhi. This was also accepted and registered. These are the two consignments with which we are concerned in appeal.

[3] The plaint also included another consignment of 280 bags tendered to the railway authorities on 18-5-1942. There is, however, a finding of fact in respect of this to the effect that the authorities refused to accept the consignment, and accordingly the matter was excluded from the scope of this suit in the lower Courts. That finding is accepted here, and we are not concerned with these 280 bags.

[4] The plaint alleges that the railway authorities were maliciously negligent and allowed his goods to be injured by rain, theft and damage from cattle in spite of his protests, and [illegible]

order to minimise the loss. Eventually, he was permitted to remove them on [illegible] and he did so. He claims damages in respect of the deterioration upto this date. Also on that date, according to the plaintiff, [illegible] have been lost, and he sues for the value of the cotton seed in these bags.

[5] The lower appellate Court has found in the plaintiff's favour on all material questions of fact, but the learned Judge holds that the claim is governed by Art. 30, Limitation Act and holds that it is barred by limitation.

[6] The following provisions of law fall for consideration. In a case of this kind, the responsibility of the railway administration is fixed by S. 72, Railways Act. That section is as follows:

"The responsibility of a railway administration for the loss, destruction or deterioration of ... goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under Ss. 152 and 161, Contract Act, 1872."

Section 161, Contract Act, which is the relevant section here provides:

"If by the default of the bailee the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time."

Next follow the provisions of the Limitation Act. Article 30 provides that in a case against a carrier 'for compensation for losing or injuring goods' the limitation shall be one year and will run from the date when "the loss or injury occurs." Sections 23 and 24, Limitation Act, are also in point. Section 23 provides that:

"In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong as the case may be, continues."

Section 24 is in the following terms:

"In the case of a suit for compensation [illegible] which does not give rise to a cause of action unless [illegible] specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results."

[7] The facts are as follows. The goods were consigned for carriage over the railway [illegible] to certain stations. In the ordinary course they ought to have been delivered at the respective destinations for which the consignments were intended. It is, however, [illegible] that this was rendered [illegible] shortage of wagons due to the war. I say it is accepted by both [illegible] that I mean accepted in this Court because there is a finding of fact to that effect which counsel on both sides accept. That being the case, it became the duty of the railway administration to return the goods to the consignor owing to circumstances of [illegible] over which the railway administration [illegible]. It is impossible to fix any [illegible] for this, but it is evident that [illegible] end [illegible] from [illegible] his [illegible] to him, [illegible] ho[illegible] them [illegible] 8 0

[8] The main question for determination is about limitation. The defendant's responsibility under S. 72, Railways Act was not denied. It was argued on the one side that Art. 30, Limitation Act applies while the other side pressed the claims of Art. 115. I do not consider it necessary to resolve that conflict. I will assume that Art. 30 applies because, if it does not then the claim is clearly within limitation under Art. 115. I will, therefore confine my attention to a consideration of Art. 30.

[9] Under Art. 30, limitation against a carrier for compensation for losing or injuring goods is one year from the date when the loss or injury occurs. It was argued that the loss or injury is the gist of the action in this case because mere negligence in itself will not constitute a cause of action. No suit grounded on negligence can lie unless and until loss or injury results. It was said that the loss here first occurred in June or July when the first rain fell. Therefore the goods were injured on that date and the cause of action having accrued time commenced to run from June or July, and if that is accepted then the suit is beyond time. In the alternative it was argued that in any event damages can only be awarded in respect of such loss as occurred within 14 months of suit, 14 months because Art. 30 prescribes one year and S. 15 (2) read with S. 80, Civil P. C. gives another two months. Therefore the value of the goods on 1-9-1942 will first have to be ascertained and next the value at the date of suit. The correct measure of damages will be the difference between the two.

[10] I am unable to agree. Article 30 prescribes that time shall run from the date when "the loss" occurs. This can only mean the loss which is claimed in the suit. If the claim is within time then, in my opinion, all loss which occurred up to 3-9-1942, the date on which the plaintiff was permitted to remove his goods, can be claimed. I will deal with this later.

[11] The loss in the present case was due to the deterioration of the goods owing to the running and continuous negligence of the defendant's servants. It did not occur all at once. Each successive day made matters worse. Every succeeding moment aggravated the injury. Now, deterioration of goods due to continued negligence is a continuing wrong. The deterioration here was due to many causes. The rain, of course, was one of them but it was not the sole cause. Other causes are the continued negligence of the station authorities, the neglect to cover the goods, the neglect to remove them under cover, cover being available, the neglect to minimise the effect of the rain once it had fallen, the refusal of the station authorities to allow the plaintiff himself to remove them under cover, cover being available, and their action in preventing the plaintiff from taking away the goods altogether. All these things combined caused the injury complained of in this suit, namely, "the loss" at the date of suit. It was argued on behalf of the defendant that the injury was caused by rain alone and that the rest of the deterioration was a consequence of that original injury, and, therefore, we are thrown back under Art. 30 to the date on which the rain first fell and first damaged the cotton-seed. As I have said, I do not agree.

[12] I say I do not agree because the plaintiff was prevented by the railway authorities from removing his goods. He was prevented by the action of the defendant's servants. The goods kept on deteriorating right up to the last minute, that is, right up to 3-9-1942. Therefore, the injury on 3-9-1942 to the goods was much more than it was in June or July when the rain first fell. Now, the plaintiff not only was not bound to sue piecemeal for the damages caused but he could not have included in his claim damages for possible future loss had he sued earlier. Therefore he was entitled to wait till he had one comprehensive cause of action. There was here a continuing cause of action which continued right up to 3-9-1942. Therefore he was not bound to sue earlier.

[13] It is perhaps futile to turn to the English law, but, in my opinion, the principles expounded in certain English decisions are of value here. First, there is (1894) 1 Ch. 293[1] where Lindley L. J. defined a "continuing cause of action" in the following terms:

> "What is a continuing cause of action? Speaking accurately there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.

and referring to O. 36, R. 58 of the Rules of the Supreme Court in England, which directs that damages in the case of a continuing cause of action shall be assessed down to the time of the assessment, he said:

> "Its object being to prevent the necessity of bringing repeated actions in respect of repeated nuisances of the same kind ."

[14] We have not got quite the same statutory provisions in India but I have no doubt that the object of the rule underlying S. 23, Limitation Act is similar. Therefore a plaintiff is not bound to launch an endless succession of suits each day a continuing wrong persists. He can wait and includes in the action all damages down to the date of the suit. Equally he can sue again for any fresh loss occurring after suit in respect of the same continuing loss because as Williams J. observed in (1861) 30 L. J. C. P. 305[2] at p. 311:

> "It would surely have been a monstrous thing to have presumed that the trustees (the wrong-doers in that

[illegible]

the wrong "

[15] The law presumes that a wrongdoer will desist once his action is determined to be wrong. But even that apart it would be against public policy to permit such action because if a man is to be mulcted in damages for future injuries in the case of a continuing wrong there will be no inducement to him to desist. Therefore the proper rule, in my opinion, in a case of continuing wrong is to assess damages down to the date of suit The application of that rule to the present case will mean damages down to 8-9 1942 because after that date the responsibility for any further deterioration was the plaintiff's I must not be taken to say that I exclude future damages which can be laid and proved as special damages That is possibly another matter My decision is confined to the facts of the present case

[15a] (1861) 30 L J C P 305[3] is also instructive for another reason In essence the case was similar to the present In that case the local laws had cast a duty on the defendant to collect the rain and other water in a certain area and deflect it harmlessly from the neighbourhood They carried out this duty negligently by constructing certain inefficient "catch pits " The result was that every time there was a heavy shower of rain water flowed over the plaintiff's land and injured it The limitation for the action was three months, [illegible] only right [illegible] catch pits [illegible] atived and

Williams J said

'I must assume that an injurious act had been committed by the trustees improper management of the catchpits by which they had caused the water to flow into the plaintiff's pits The question is, whether the plaintiff is bound to rely on the negligence of the trustees when it first occurred, or whether he can maintain an action brought within three months after any fresh damage [illegible]

Then he continued

'The true answer, I think, is, that although a party should not be allowed to bring a fresh action merely because there has been a fresh damage, yet when there has been not only a fresh damage but a continuance of the wrongful act which caused it, that is a new cause of action in respect of which the party may bring his action."

Byles J said, distinguishing (1859) El Bl & El. 623 (646) 120 E R 613 (652)[5]

"In that case '(that is *Bonomi v Backhouse*)' one damage only followed on the doing of one act. Here, however, with every violent shower of rain, there is fresh damage and a new cause of action "

[16] So, in the present case, every successive shower of rain aggravated the position and each *succeeding day* of neglect, whether there was sun or rain or cloud, added to the havoc. Minute by minute, by imperceptible degrees the state of the goods worsened and their value depreciated On each succeeding day there was added fresh damage which gave rise to a new cause of action until eventually "the loss" in respect of which the suit was brought had relation to 8 9 1942 The claim was accordingly in time And as to the measure of damages that, as I have shown, could be claimed down to 8 9 1942 This is also the view of Ramaswamy Iyer in his Law of Torts, Edn, 3, page 239

[17] But that apart. This is a kind of action in which exemplary damages can be claimed. There can be no doubt on the finding of the lower appellate Court that the action of the defendant was wilful and malicious In para 23 the learned Judge of the lower appellate Court finds

'In preventing the appellant (plaintiff) from removing his goods to the covered sheds even though such permission was given to other merchants conclusively shows that the station master gave him a different al treatment and that this was due to the existence of bad relations betwe n them "

[18] The rule regarding exemplary damages is not limited to actions in trespass but can be extended to other kinds of tort where the circumstances warrant it It was so extended as far back as 1860 in England In (1861) 30 L. J E 71[4] at p 73, Channell B said

"My Brother Bramwell has observed that in an act on of trespass that is, in some actions of tort you may give evidence of damage beyond the actual injury sustained, in consequence of insulting circumstances connected with the trespass, and I can see no reason [illegible]

[19] This rule was later applied in an action against a railway company Willes J said in (1861) 30 L J C P 273[5] at p. 280

'As to the amount of damages, this was a case though the action is not in trespass in which the jury might give exemplary damages from the character of the wrong and the way in which it was done.'

Accordingly even if damages were to be limited to the deterioration which occurred within 12 months of suit and it was possible to determine this, seeing that the goods were in the defendant's custody and the plaintiff was allowed no access to them, the remainder of the sum awarded could be sustained under this head.

[20] As to S. 24 Limitation Act, I agree that this is a suit in which the negligent act in itself did not give rise to a cause of action No suit would have lain unless and until specific injury occurred to the plaintiff. To that [illegible] 24

applies. But S. 23 also applies because we have here a continuing cause of action. The manner in which the two matters can be combined is well illustrated by (1861) 30 L. J. C. P. 305[2] which I have referred to above. Then, the cause of action having accrued and specific injury having been established, there lay the right in the Court to award exemplary damages over and above the specific injury caused because of "the character of the wrong and the way in which it was done."

[21] It was argued that the loss was due to the plaintiff's refusal to remove the goods, and my attention is drawn to Exhibit P-71 at p. 116 of the paper-book. There is, however, a finding of fact of the lower appellate Court to the following effect:

> "The appellant had waited long enough and his removal of the goods on 3-9-1942 cannot be construed against him. Indeed, he was trying for a long time to secure permission for removal of his goods, but the station master was putting some obstacle or other in his way as is apparent from the documentary evidence put on record by the respondent."

This finding is based on evidence. The learned Judge refers, for example, to Exhibit D-6. That contains internal evidence to the effect that the station authorities were obstructing the plaintiff down to 14-7-1942. Then there are other documents, for example, Exhibits P-12 and P-16, which show that the plaintiff was complaining of obstruction down to 21-8-1942. There is accordingly evidence on which the finding of fact can be sustained, and this being a second appeal I have no jurisdiction to go behind that finding. It must, therefore, be accepted that the plaintiff was prevented from removing the goods before 3-9-1942 and that the injury down to that date was caused by the defendant and not by the plaintiff. As I have said, the injury continued till 3-9-1942.

[22] It was next argued that there is no evidence to show that the injury occurred, or indeed continued, down to 3-9-1942. That, however, in my opinion, is evident from the facts. We know that the goods consisted of cotton-seed. We know that they were left by the railway authorities in the open. We know that they were damaged by rain. Now, when cotton-seed is damaged by rain and is left unattended, it continues to deteriorate from day to day and from month to month. Accordingly, it is evident that the deterioration on 3-9-1942 was worse than on the days which preceded it. Therefore, the total damage inflicted, that is to say, "the loss" sued for, occurred on 3-9-1942 and not before. Before that there was partial damage, but the defendant is responsible for the total damage down to the date on which the plaintiff was for the first time allowed to take away his goods, because of the continuing negligence.

[23] Next, certain technical objections were raised regarding the date given of the cause of action in the plaint and in the notice. Referring first to the plaint, it was said that the plaintiff was bound to disclose when the cause of action accrued. The plaintiff states that it accrued on 5-10-1942. This is wrong whatever view of the case is taken. Therefore, it is argued, the correct cause of action not having been disclosed in the plaint the plaintiff must be non-suited. With that I am unable to agree.

[24] Cause of action has been defined by several Judges. A summary of their decisions will be found in Mulla's Civil Procedure Code, Edn. 11, at page 118. It is defined there to mean:

> "Every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court."

And again,

> "It is, in other words, a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit."

[25] It will be evident from this that when a plaintiff sets out his cause of action it is not set out in the clause which states when the cause of action arose. It is set out in the fact. which, he alleges, gives him a right of suits Those facts are set out in the preceding clauses of the plaint, and all the facts alleged there are ample to support the present claim. The date which the plaintiff gave of the accrual of the cause of action was an inference which the plaintiff drew from the facts set out in the preceding paragraphs of the plaint The inference was wrong but it was nevertheless an inference of law. In my opinion, a wrong inference of that kind would not be sufficient to non-suit the plaintiff when all the facts on which the relief is grounded have been fully and accurately set out.

[26] It was then said that the notice given under S. 80, Civil P. C. does not set out the cause of action on which the plaintiff has sued, or at any rate on which he is now succeeding. My attention was drawn to Exhibit P-17 where the cause of action is said to be the non-payment of damages and is said to have arisen on or about 5-10-1942. There again, there is a misapprehension as to what cause of action imports and implies. As I have said, it does not consist of a sentence in the plaint or a pleading setting out the date on which it arises, but consists of the whole bundle of facts which the plaint or the notice sets out as supporting the plaintiff's right of suit. The facts given in the notice are substantially the same as the ones given in the plaint. Therefore, in my opinion, the cause of action was fully disclosed both in

the notice and in the plaint though the plaintiff's inference regarding the date on which it accrued was wrong

[27] The object of notice under S. 80 Civil P. C. is stated by Sir D. F. Mulla at page 803 of his Civil Procedure Code Edn. 11, to be

> to give the Secretary of State ... an opportunity to reconsider his legal position and to make amends or settle the claim if so advised without litigation

The facts set out in the notice (Ex. P 17) give ample notice of all that the plaintiff was complaining of and afforded the Governor General in Council ample apportunity to decide whether to settle or fight and if to fight the nature of the case which he had to meet

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This refers to the first portion of the claim relating to the bags which the plaintiff took away on 3-9-1942 and which had deteriorated in value

[29] That leaves the remainder of the claim relating to the 44 bags which the plaintiff says were lost. The lower appellate Court holds that only 15 bags were lost and this being a question of fact the finding must be accepted. The value of these 15 bags is given as Rs. 52-8-0. That also must be accepted

[30] It was argued as regards this that this is a case of non delivery and therefore falls under Art. 31 Limitation Act. It was said that *there is no evidence to show when the bags were* lost and therefore it is said that the plaintiff's claim must fail because the burden is on him to bring his suit within time

[31] It is true there is no direct evidence to show when the bags were lost but there is sufficient evidence to enable a Court to draw the inference that they were not lost before 3-9-1942. The position is this. We have on the one side the duty of the Court to draw the presumption that the railway administration was carrying on its duties efficiently and properly except to the extent that is otherwise shown. If the loss had occurred before 3-9-1942 the administration if it had done its duty properly (and that must be presumed until the contrary is shown) would have noticed the loss and would have reported on it. The facts were specially within their knowledge and S. 106 Evidence Act applies. Accordingly I am entitled to presume from the facts that the defendant's servants made no report of the loss or complaint about it down to 3-9-1942 that there was no loss down to that date. On 3-9-1942 the bags were not found. Accordingly I am entitled in the absence of all other evidence to assume that the loss occurred on 3-9-1942 and not earlier. In any event the burden is on the defendant to prove the date of the loss once the plaintiff adduces *prima facie* evidence in this behalf: see the cases collected in U. N. Mitra's Limitation and Prescription Edn. 6 page 1132

[32] The lower appellate Court assesses the damages at Rs. 1501-10-0. That is the total damage under both heads of the claim. This being a second appeal that must be accepted and as a matter of fact the finding is not contested by the learned counsel for the appellant

[33] The result is that the appeal is allowed. The decrees of both the lower Courts are reversed and a decree will now be passed in the plaintiff's favour for Rs. 1501-10-0

[34] As regards costs the claim in the first Court was Rs. 3123/14-0. It had succeeded to the extent of half. The plaintiff will accordingly get half his costs and will pay half the costs of the defendant. In the lower appellate Court the position was the same. The appeal was for the full amount of the claim. Accordingly there also the plaintiff will get half of his costs and will pay half the costs of the defendant. In this Court the claim was for Rs. 1501-10-0 only. The plaintiff has succeeded to the full extent of that claim here. Accordingly he will get all his costs in this Court

V.B.B. *Appeal allowed*

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## A. I. R. (34) 1947 Nagpur 229 [C. N. 64.]

### PURANIK J.

*Marutirao Govindrao — Plaintiff — Applicant v. Nathmal Jodhraj and another — Defendants — Non applicants*

Civil Revn. No. 544 of 1944, Decided on 5-7-1946, from order of Sub-Judge 2nd Class, Ellichpur, D/ 15-11-1944

Berar Land Revenue Code (1928) S. 183 — Pre-emption suit — Scope of — Civil P. C. (1908) O. 1 R. 3 and O. 2 R. 3

*A* sold certain field to *B*. *P* brought a suit for pre-emption against *B* and *C* alleging that the allegation in the sale deed that the field had been leased to *C* was false, that the lease was bogus and had been obtained by *B* and *C* collusively from *A* with a view to ... his right of pre-emption, that *B* was in ... the field and *C* was never in possession ... the alleged lease. *P* thereafter ... possession of the field by having it ... lease in favour of *C* was ... right of pre-emption

*Held* that (1) the Court ... S. 183 to go into the question ... a necessary party to the ...

(2) As ... deed which was ...

plaint ought to be permitted to join the same and not be driven to a separate suit. [Para 6]

('44 Com.) C. P. C., O. 2, R. 3, N. 8; O. 1, R. 3, N. 3; N. 6.

*G. R. Mudholkar*—for Applicant.

*K. M. Ghumre and V. K. Sanghi*—for Non-applicants 1 and 2, respectively.

**Order.**—The applicant Marutirao Govindrao Kunbi instituted a suit for pre-emption against non-applicant 1 Nathmal and non-applicant 2 Narayandas. One Babulal owned field survey No. 8/1 The plaintiff-applicant is a co occupant and claims pre-emption as Babulal Naranyandas sold the field to Nathmal on 19th June 1944.

[2] The plaintiff-applicant denied the consideration as stated in the sale-deed and stated that the real value of the property was Rs. 1300 though the sale deed mentions Rs. 4000. He further stated in the plaint that the allegation in the sale deed that the field was let out to defendant 2, Narayandas by lease deed dated 17-2-1944 was false. According to the plaintiff the lease deed dated 17th February 1944 is bogus and has been obtained from the original vendor by defendants 1 and 2 collusively with a view to clogging the plaintiff's right of pre-emption. Defendant 2 is a near relation of defendant 1. The field is in the possession of defendant 1 since the purchase, and defendant 2 was never in possession by virtue of the alleged lease. He therefore claimed pre-emption on payment of Rs. 1300 or such other amount as would be fixed, and he prayed that he should be placed in possession of the field by having it declared that the lease deed dated 17th February 1944, said to have been executed in favour of defendant 2, by the original owner of the field was bogus and did not in any way affect the plaintiff's right of pre-emption.

[3] Defendant 2 claimed to be discharged from the suit stating that he was not interested in the pre-emption, and defendant 1 also asked that defendant 2 should be discharged from the suit as he was not a necessary party. The plaintiff, however, argued that both the defendants were necessary parties to the suit as he had challenged the allegations in the sale deed and wanted a decision that the lease was bogus and did not affect his right of pre-emption.

[4] The lower Court, however, held by its order dated 15th November 1944, that the genuineness or otherwise of the lease deed could not be gone into in a pre-emption suit. It therefore discharged defendant 2 from the suit and is proceeding with the suit for pre-emption only. It is against this order that this application for revision is filed in this Court.

[5] I am not aware of any law which prevents the Court from trying a suit as laid. The plaintiff's case is for pre-emption under S. 183, Berar Land Revenue Code, and sub s. (2) of that section permits the Court to examine the transaction and fix a fair consideration for the interest to be pre-empted. The plaintiff in this suit is asking the Court to examine the transaction of sale in favour of defendant 1. In that sale deed in favour of defendant 1 there are recitals regarding the lease deed. There are also recitals regarding consideration. The plaintiff wants the Court to examine those recitals and hold that the lease is bogus, that defendant 1 himself is in possession of the field and that the consideration, viz., Rs. 4000 as stated therein, is also not true, the value of the property being only Rs. 1300. Under the terms of S. 183, Berar Land Revenue Code itself the Court is bound to examine the transaction and cannot say that it will not go into the question of lease which it has been asserted, has been introduced in the sale-deed by the defendants with a view to defeating the rights of the pre-emptor as stated by him in the plaint. On pre-emption the plaintiff is entitled to be placed in possession of the property, and it is but proper that he should have good title on payment. If, as the plaintiff says, the lease is bogus, and if defendant 1 himself is in possession, defendant 2 being merely a benamidar, the plaintiff is entitled to have that point cleared up in this very suit instead of being driven to another suit. There is nothing in the Berar Land Revenue Code stating that an inquiry of the nature contemplated by the plaintiff in this suit should not be held. Inasmuch as defendant 2 is a necessary party to such an enquiry, and as that inquiry must be held in his presence the plaintiff is right in joining him as a party. The Court below had jurisdiction to hold the inquiry in this very suit.

[6] Assuming that the plaintiff in this suit for pre-emption is joining a claim for a declaration regarding the lease deed, which is a distinct cause of action, I am clearly of the opinion that in the circumstances of the case and on the allegations made in the plaint the plaintiff ought to be permitted to join the same and not *be driven to a separate suit.* I hold that the suit as laid is correct, that the plaintiff is entitled to an enquiry regarding the same against both the defendants in this very suit, and that it is not necessary for him to separate his case for pre-emption from his case for a declaration that the lease is bogus. I set aside the order of the Court below and order the trial of the suit as laid. The application for revision is allowed with costs. Counsel's fee Rs. 25.

G.N. *Application allowed.*

**A I. R (34) 1947 Nagpur 231 [C N 65]**

GRILLE C J AND HIDAYATULLAH J

*Pralhad Ambadas Upasane and another— Plaintiffs — Appellants v Shantabai and others — Defendants — Respondents.*

Second Appeal No 159 of 1941 Decided on 29 8 1946 from appellate decree of Dist Judge, West Berar Division Akola D/ 15 10 1940

Hindu law—Gift—Construction — Gift to person described as adopted son but whose adoption is invalid

Where in a deed of a testamentary character a devisee or donee is wrongly described as an adopted son of the testator the law is that the validity of the bequest depends on the intention of the testator which is to be gathered from the terms of the document or if necessary from the surrounding circumstances It may be that the devise is intended to operate only by reason of the devisee being treated as an adopted son in which case the gift would fail or it may be that the intention of the testator is clear that the gift is personal to the boy named irrespective of any description that may be given [Para 4]

*M* executed on the day before he died a deed of adoption for the purpose of ratifying the alleged adoption of *D* The deed began with a recital that the executant was childless and that he had adopted the boy for the continuation of his line and family observances He then stated that from that time the boy *D* became the heir of his whole property On the same day *S* who would be the heir in the absence of a valid adoption was given a small portion of the property by a will The adoption was not established

*Held* that if there were in this document any actual giving of property as opposed to recital the giving would be conditional on the adoption having taken place and that the giving would not be to a *persona designata* irrespective of his status as a member of the

*Held* further that the deed itself was unexceptional

*Cases referred* —

1 (77 78) 3 I A 253 26 Suth W R 91 3 Sar 653 3 Suther 339 (P C) Nidhoomoni Debya v Saroda Pershad Mookerjee

2 (85) 11 Cal 463 12 I A 72 4 Sar 610 (P C) Fanindra Deb Raikat v Rajeswar Das

3 (99) 22 Mad 383 26 I A 83 7 Sar 491 (P C) Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v The Court of Wards

4 ('97) 20 Mad 167, The Court of Wards v Venkata Surya Mahipati Rama Krishna Rao

5 (06) 28 All 488 33 I A 97 (P C) Lall v Murli Dhar

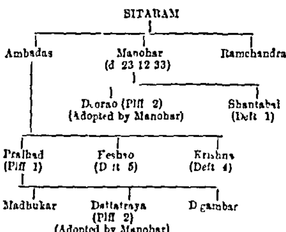
6 (23) 10 A I R 1923 Bom 302 77 I C 477, Shidarpa v Santawa

7 (23) 4 Lah 3 6 11 A I R 1924 Lah 103 74 I C 231 Ishar Singh v Surat Singh

*D T Manjamoorti*—for Appellants.

*M R Bobde and S N Kherdekar, and S Sohoni*—for Respondents 1 and 2 respectively.

**Judgment** — This is a plaintiffs' second appeal their suit having been dismissed in the trial Court and their first appeal having failed The following genealogical tree will show the relationship between the parties excepting defendant respondents 2 and 3, who are purchasers from defendant 1




The plaintiffs are Pralhad and his minor natural son Dattatraya Pralhad claimed that Manohar had died in a state of jointness with his brother Ambadas (Ramchandra had died previously) and that consequently he and Dattatraya his son succeeded to Manohar's property by survivorship In the alternative it was pleaded that in the event of it not being established that Pralhad and Manohar were members of a joint family at the time of Manohar's death Dattatraya had been adopted by Manohar shortly before his death and had taken the name of Deorao and is consequently entitled to succeed to Manohar's property to the exclusion of Mt Shantabai, defendant 1, who, had there been no adoption, would be Manohar's heir Finally it was pleaded that in the event of neither of the previous contentions being upheld Deorao was entitled to succeed as a devisee by virtue of a document dated 22 12 1933 executed by Manohar on the day before he died which read in conjunction with a will executed on the same day, had the force of a will although it purported to be a deed of adoption in favour of plaintiff 2 Both the trial Court and the lower appellate Court have held against the plaintiffs on all three contentions It has been found that Manohar had been separated before his death, that the plaintiffs had failed to prove that Manohar had adopted plaintiff 2 and that the document Ex P 46, cannot operate as a will

[2] In appeal before us it is conceded that the first two questions posed in the memorandum of appeal namely that of the jointness of the family and of the actual ad n of traya, cannot be pressed as

are findings of fact; but it has been contended that the deed of adoption, which was executed one month after the date on which the adoption is said to have taken place, is in fact a deviso of property to Dattatraya as a *persona designata* and that although he may be therein described as an adopted son the devise must nevertheless hold good.

[3] We append a translation of this document (Ex. P-46):

" Deed of adoption [executed] in favour of Dattatraya Prahlad Uparane, Brahmin, minor under the guardianship of his father Pralhad Ambadas Upasane Brahmin, resident of Akot, taluk aforesaid, district Akola, by Manohar Sitaram Brahmin, resident of Sukanda, taluk Basim, district Akola, in the year 1933 A.D., to the following effect:

I have no male issue of my own and, in order to continue my *Kul dharma* (probably " family observances) and line, I have duly asked your natural parents (for you) and have adopted you i.e. the younger son of Pralhad Ambadas, Uparane, Brahmin, resident of Akot by name Dattatraya, according to Hindu law in the presence of Dewas (deities), Gurus (preceptors), Brahmins, and (my) relatives and friends, and you have *now been named Deo Rao. (You) may* hereafter keep up the name of Manoharpant and propagate the line. You have, from this day, become the owner of the whole of my ancestral and self-acquired movable and immovable property. During my lifetime, however, I shall be entitled to manage and look after the entire property. So long as I am alive, you cannot disturb this power. During my life-time you cannot independently of me effect any transaction in respect of the property. Unless the heirs [probably " the beneficiaries "] mentioned in the will dated 22nd December 1933 A. D. dispose (i.e. transfer) (their) properties, the adopted person shall not show a right thereto. I have executed this deed of adoption with my free will and pleasure. The same is binding on my heirs and estate. Dated 22nd December 1933 A. D. By the pen of Balkrishna Ragao Dhaole, resident of Patur."

[4] Where in a deed of a testamentary character a devisee or donee is wrongly described as an adopted son the law is that the validity of the bequest depends on the intention of the testator which is to be gathered from the terms of the document, or if necessary, from the surrounding circumstances. It may be that the devise is intended to operate only by reason of the devisee being treated as an adopted son, in which case the gift would fail, or it may be that the intention of the testator is clear that the gift is personal to the boy named irrespective of any description that may be given (*vide* Mayne on Hindu Law and Usage, Edn. 10, para. 216, and Mulla's Hindu Law, Edn. 9, S. 511). This proposition is to be gathered from a series of cases beginning with 3 I. A. 253[1] where a boy, declared in a will to be adopted and whose adoptive mothers were directed to perform certain ceremonies and bring him up and hand over the property on his majority, was held to be entitled under the will despite the fact that the ceremonies to be performed in the future were only partially completed. The property here had been devised to the son already irrespective of the ceremonies which were directed to be performed at a later date. In 11 Cal. 463[2] a man, in anticipation of imminent death, executed an angikar-patra authorising a boy whom he said he had adopted to offer oblations of water and pinda to him and his ancestors on his death by virtue of his being his adopted son. The document then continued: " Moreover you shall become the proprietor of all the movable and immovable properties which I own." Their Lordships, holding that the question was whether the mention of him as an adopted son was merely descriptive of the person to take under the gift, or whether the assumed fact of his adoption was not the reason and motive of the gift, held that the latter view was correct and that it was the executant's intention to give his property to Rajeswar, the person mentioned in the deed, as his adopted son capable of inheriting by virtue of the adoption. The adoption was in fact invalid and consequently the rule that it was not essential to the validity of a devise or bequest that all the particulars of the subject or object of the gift should be accurate was not applicable. These are the principal cases indicating when in such circumstances a devise is valid and when it is not valid. In 22 Mad. 383[3] being an appeal from the decision reported in 20 Mad. 167[4] a Raja by his will specifically devised his property to a person whom he described as his natural son. Although it was established in the course of the case that the devisee was not the natural son nevertheless it was held that there was a gift in the will to the person so misdescribed, personally, and that the false description, which necessarily had to be assumed to be false, in the will did not vitiate it. In 28 ALL. 488[5] the same question arose, namely whether in the case of an adoption which was held to be an invalid adoption the alleged adopted son was entitled to take under a wajib-ul-arz which in that particular case was treated as a will. It was held there that the intention of the devisor was to give the property to the devisee as his adopted son capable of inheriting by virtue of the adoption and that as the adoption was invalid in law the gift had no effect upon the property.

[5] Mr. Mangalmurti for the appellants, with considerable ingenuity, argues that since he has failed to establish that there was in fact an adoption which was said to have taken place rather more than a month previous to the execution of this deed, the description by Manohar of Dattatraya as his adopted son was deliberately false and that therefore the case falls within the ambit of 22 Mad. 383[3] and that consequently it

follows that Dattatraya must be treated as a devisee *persona designata* irrespective of any question of adoption He also urges that in the will executed at the same time (and its execution has been established) there are bequests of small parts of the property to Mt. Shantabai, his daughter and to two other relatives, that these comprise only a small part of the property, and that consequently Manohar must have had in mind the existence of an heir other than Mt. Shantabai who would take the rest Now, even on the assumption that the deed of adoption Ex P 46 could be looked at as a will—and we shall later show that it cannot be looked at as such—the wording of the document is much more akin to that in 11 Cal. 463[7] and 22 ALL. 455[5] than to that in 31 I A 253[1] and 22 Mad. 383[3] The document begins with a recital that the executant is childless and that he has adopted the boy for the continuation of his line and family observances He then states that from that time the boy becomes the heir of his whole property What he is stating is nothing more than a fact which flows of necessity from adoption, and the document follows the premise that the adoption had already taken place some time before, although the plaintiffs have failed to establish this in the trial Court and in the Court which is the final judge of fact If there were any actual giving of property in this document, as opposed to recital, we are of opinion that the giving would be conditional on an adoption having taken place and that the giving would not be to a *persona designata* irrespective of his status as a member of the family charged with pious obligation Neither can the fact that Mt Shantabai, who has been found to be the actual heir, was given a small portion of the property by a will on the same day derogate from this view

[6] As was stated in A I R 1923 Bom 302[6] a document of this nature, a deed of adoption executed for the purpose of ratifying an adoption in fact, although it contains the words, "you alone are the full owner of my movable and immovable property," cannot be construed as connoting an intention to transfer such properties unless actual words of conveyance or transfer are used The case indeed has a close resemblance to the one now under consideration In 4 Lah 326[8] it was also held that a deed of adoption cannot of itself affect the rights of succession We must hold that there was no adoption in fact and consequently the conclusion must be drawn that on the imminence of his death Manohar, being unable to arrange for an adoption at short notice to satisfy his spiritual needs, had drawn up an adoption deed in the form which would be usual had an adoption taken place so that he would obtain the highest spiritual benefit on his deathbed, and that opportunity has been taken to use this circumstance, which may, in a term for once applicable, be called a pious fraud, to the plaintiffs' own advantage The document itself is unexceptionable as a deed of adoption, assuming that the ceremony had taken place, but the use of this as a will when it does no more than state an inevitable fact flowing from events said to have taken place a month before and contains no intention to devise or bequeath, is impossible

[7] The result is that the appeal fails and is dismissed with costs

V B B *Appeal dismissed*

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## A. I. R (34) 1947 Nagpur 233 *[C N 66]*

### BOSE J

*Kisan Bhaguan Marathe and others — Applicants v Shree Maroti Saunsthan Molo ri and others — Non Applicants*

Civil Revn No 399 of 1944 Decided on 5 2 1947, from order of 2nd Sub Judge 2nd class Basim D 31-7 1944

(a) Hindu law — Idol — Suit for possession by worshipper on behalf of idol — Worshipper described as plaintiff — Maintainability of suit — Amendments in plaint suggested

Ordinarily, an idol must be represented by its duly [illegible] person has a [illegible] n can however [illegible] ersonal interest [illegible] worshipper or [illegible] self or of the [illegible] ter of the suit and that the shebait or manager who would ordinarily represent the idol has an adverse interest *Case law referred* [Paras 3 10 & 11]

Certain property was gifted to an idol Two worshippers who described themselves as plaintiffs 2 and 3 [illegible] sion of that pro- [illegible] ces wahiwatdars [illegible] 'aintiffs did not [illegible]

*Held* that the plaintiffs would be permitted to sue on behalf of the idol only as its next friends and the plaint should be amended so as to remove their names as plaintiffs, and by adding a prayer that the property should be placed in the possession of the wahiwatdar for and on behalf of the idol [Paras 6 and 9]

[illegible]

Civil P C —(44 Com) S 92, N 9

(c) Civil P C (1908) S 92—Evasion of section

A plaintiff cannot be allowed to evade the provisions of S 92 by asking for a relief which is not covered by S 92 and then to evade its provisions by [illegible] matter which is foreign to the relief [illegible]

would be covered by S. 92 had the suit been framed otherwise. [Para 5]

(d) Hindu law—Temple—Temple whether legal entity and whether can sue *(Quære)*. [Para 2]

(e) Civil P. C. (1908), O. 7, R. 7—Suit for possession—Prayer for other reliefs– Construction.

Where a suit is for possession and the usual prayer for other reliefs, the prayer for other reliefs can only be construed to mean reliefs ancillary to the main claim for possession. [Para 2]

A suit for possession on behalf of *A* in whom alone the title is said to reside cannot be turned into a suit for other reliefs which are to benefit *B*, *C* and *D* in a totally different capacity. [Para 2]

Civil P. C.—('44-Com.), O. 7, R. 7, N. 2.

*Cases referred :—*

1. ('42) I. L. R. (1942) Nag. 468 : 28 A.I.R. 1941 Nag. 317 : 197 I. C. 602, Byankat v. Ramchandra.
2. ('28) 55 Cal. 519 : 15 A. I. R. 1928 P. C. 16 : 55 I. A. 96: 108 I C. 361 (P.C.), Abdur Rahim v. Mahomad Barkat Ali.
3. ('25) 52 Cal. 809 : 12 A. I. R. 1925 P. C. 139 : 52 I. A. 245 : 87 I. C. 305 (P. C.), Pramatha Nath v. Pradyumna Kumar.
4. ('36) 63 Cal. 451, Pashupatinath Seal v. Pradyumna Kumar.
5. ('32) 19 A. I. R. 1932 Bom. 305 : 138 I. C. 433, Maruti v. Gopal Krishna.
6. (1 00) 24 Bom. 170, Kazi Hasan v. Sagun Balkrishna.
7. ('17) 40 Mad. 212 : 4 A. I. R. 1917 Mad. 112 : 38 I. C. 73 (F B), Venkatarama Ayyangar v. Kasturi Ranga Ayyangar.
8. ('41) 1941 N. L. J. 587, Nago Rao v. Gulab Rao.
9. ('81) 8 Bom. 432, Thakersy Dewraj v. Harbhum Nursey.

*K. V. Brahma* — for Applicant.

*P. K. Tare* ; *N. M. Dharaskar* ; *D. B. Padhye* ; and *S. N. Kherdekar*—for Non-Applicants Nos. 3-5 ; 2 (b) ; 1 & 2 ; and 6 & 7, respectively.

**Order.** — This revision arises out of three suits for possession of three fields, one suit for each field. These suits were consolidated in the first Court. The fields belonged to one Shivaji. He died in 1931 leaving his nephew Udebhan as his heir. In 1932 Udebhan gifted the property in dispute to a temple, or more properly, to the idol, Shree Maroti Sansthan Mobori. The suit is for possession but it has not been filed by the wahiwatdar of the idol. Instead, two persons who describe themselves as plaintiffs 2 and 3 in the plaint, purport to sue:

> "On behalf of the plaintiff 1 Sansthan, the trustees, wahiwatdars and the Hindu community of the village Mobori";

and they sought the permission of the Court to sue in a representative capacity under O. 1, R. 8, Civil P. C. This was permitted, so the defendants seek to revise this order. The contentions of the defendants are first, that if the suit is by the temple then the plaintiffs cannot sue on its behalf, only the wahiwatdar of the temple can sue, and second, if it is a suit by the plaintiffs in their own right then S. 92, Civil P. C. is a bar because the permission of the Advocate-General has not been obtained.

[2] I think it will be necessary to analyse the claim. The suit is for possession and for nothing else. Now the only "person" entitled to possession is the "temple" or rather the idol, for it is doubtful whether a temple is a *legal entity* and whether it can sue. See Mulla's Hindu Law 9th Edn. page 480 and I. L. R. (1942) Nag 468[1] at pp. 477 and 478. The other plaintiffs described in the plaint as plaintiffs 2 and 3 have no right to possession. The title *does not* reside in them, and as they seek no other relief than the one for possession it is evident that they have no right of suit in their own behalf. Whether they have a right to other reliefs which they have not claimed is not a matter into which I can enter. Such a question can only be debated if and when a suit claiming other reliefs is instituted. The suit before me is for possession and for nothing else. It is true there is the usual prayer for other reliefs but that prayer can only be construed to mean reliefs ancillary to the main claim for possession. (See as to this 55 Cal. 519[2] at p. 527 where these words have been construed with reference to statutes. The same principle of construction applies here). A suit for possession on behalf of A in whom alone the title is said to reside cannot be turned into a suit for other reliefs which are to benefit B C and D in a totally different capacity. The learned Judge of the lower Court remarks that a plaintiff cannot be compelled to claim reliefs which he does not want to claim. But in that case he cannot be given relief which he has not asked for and which do not arise out of the relief for possession in a purely title suit. In the circumstances all I am concerned to see is whether the plaintiffs can sue on behalf of the idol for possession.

[3] Now it is beyond dispute that ordinarily an idol must be represented by its duly appointed manager or *shabait*. No other person has a right to sue on its behalf any more than in the normal course a third person can sue on behalf of a minor or a lunatic. In either case it must be the proper guardian or committee. But this rule is subject to exceptions, one of which is, when the legal or de facto guardian has an adverse interest In that event a third party *appointed by the Court* is permitted to sue *with its permission* which permission has in every case to be properly obtained, and when the right to sue is challenged the matter has to be investigated and decided. The same rule obtains in the case of an idol except that there the person suing must show that he has a personal interest in the idol, as for example, that he is a worshipper or a donor of the property in question or a settlor of the trust which embra-

ces the subject matter of the suit But once that is established, and it is shown that the shabait or manager who would ordinarily represent the idol has an adverse interest, then the suit lies These rules are founded on good sense and have long been accepted by the Courts They will be found set out in Mayne's Hindu Law 10th Edn page 927, and have been applied by the Courts in the following among other, cases 52 Cal 809[3] at p 827 63 Cal 451[4] at p 465, A I R 1932 Bom 305[5] at pp 307 and 311 24 Bom 170[6] at pp 175, 181 and 40 Mad 212[7] at p. 225

[4] As regards S 92, Civil P C, that section is limited to suits which claim one or other of the reliefs set out in the section It does not apply to suits against third parties and strangers and certainly not to a suit in which an idol sues for possession of its property or property which it claims 55 Cal 519[2] at pp 526 527 and 530, 24 Bom 170[6] at p 181, 40 Mad 212[7] at pp 228 and 231 and 1911 Nag L J 587[8] at pp 588 and 589

[5] It is evident then that the suit in so far as it is a suit by the idol for possession against a stranger, will lie But the plaint contains matter which is foreign to the relief sought and these extraneous matters will have to be expunged for a plaintiff cannot be permitted to litigate matters which are forbidden, by the expedient of phrasing his relief in some other form I respectfully concur with the decisions which hold that a plaintiff cannot be compelled to seek a relief which he does not want and I fully agree that if a plaintiff is entitled to a particular relief independently of S 92 he can seek it outside that section, and in doing so can litigate matters which would also arise in a suit under S 92 but I do not agree that a plaintiff can evade the provisions of S 92 by asking for a relief which is not covered by S 92 and then evade its provisions by litigating matter *which is foreign to the relief sought* and which would be covered by S 92 had the suit been framed otherwise

[6] It will now be necessary to examine the plaint and I will start with the entitling There are three plaintiffs The first is the idol and the other two are worshippers who have been permitted to sue on behalf of the whole body of worshippers under O 1, R 8 This in my opinion, is misconceived As I have said the *only* relief sought is possession and throughout the plaint there is no allegation that the title to the property resides in the worshippers or that they are in any way entitled to possession As I have already explained, a worshipper is entitled to act as the deity's manager or next friend for the purposes of the suit in the same way as the next friend of an infant but that does not give him a right to become a plaintiff In I L R (1912) Nag 463[1] at pp 477 & 478 it was pointed out that the title resides in the deity and the property is vested in it And in 1911 N L J 587[8] at p 588 it was said that it would be an even grosser breach of trust than the one complained of to hand over properties to persons who though they have a right of suit, are not entitled to the possession of it And in 24 Bom 170[6] at p 176 it was pointed out that the proper course is to ask that the properties be handed over to (in that case) the wakf, here, it would be the idol. The entitling of the plaint will accordingly have to be amended The names of plaintiffs 2 and 3 will be struck off from the entitling qua plaintiffs and they will be shown there as the next friends of the deity There will accordingly be only one plaintiff and not three

[7] This will directly affect the relief sought The prayer clause asks that the field be placed in possession of the *plaintiffs* in the plaint This will be altered to the *plaintiff* (in the singular) The relief also asks that this be done 'repelling all the contentions of the defendants. This passage will be struck out as unnecessary and vexatious particularly as it is impossible to anticipate the contentions of the defendants at the stage when a plaint is filed

[8] I am aware that some of the rulings to which I have referred, and also 8 Bom 432[9] to which I have not hitherto adverted because it was decided under the old Code of Civil Procedure which did not apply to religious trusts, hold that persons interested, such as worshippers can sue to enforce their own personal rights and that such rights are not affected by S 92 But in all those cases the relief sought was a mere declaration and as I have shown, even there it was said that the proper course was to seek to have the property restored to the deity see 24 Bom 170[6] at p 176 In no case has a worshipper or other person who is not the shebait or manager been permitted to seek possession, and in 1911 N L J 587[8] this was expressly refused at p 588 Therefore, I cannot allow this suit to continue until that is placed beyond doubt

[9] But there is more than that in this case The person entitled to possession of the properties on behalf of a deity is its wahiwatdar or manager when there is one This deity has a wahiwatdar That wahiwatdar is defendant 1 as para 1 (b) of the plaint discloses Neither the deity nor the two persons who sue on its behalf seek to have that manager removed Unless and until removed he is the person entitled to hold possession of the property on behalf of the deity Therefore, there will [illegible] to [illegible]

clause the following words which I have underlined (here italicized):

"That the field described in para. 2 of the plaint be placed in the possession *of defendant 1 for and on behalf of the plaintiff.*"

[10] I fully agree that in the ordinary way a plaintiff cannot be compelled to seek a relief which he does not want, but equally, in the ordinary way outsiders cannot oust the wahiwatdar of an idol and sue on behalf of the idol. This is only permissible when the interests of the wahiwatdar are adverse to those of the idol. In that event another next friend has to be appointed *by the Court*, as the Privy Council point out in 52 Cal. 809[7] at p. 827. In the circumstances it is the duty of the Court to impose restrictions and limitations where that is necessary. It is essential, as was pointed out in 1941 N. L. J. 587[9] that trust properties are not permitted to fall into the wrong hands, and as the plaintiffs steadily refuse to ask for the removal of the wahiwatdar, or to have a proper scheme prepared, I must insist that the property be placed in possession of the person who is legally entitled to hold it on behalf of the deity until he is displaced by law. It would, in my opinion, be most undesirable to have a number of different persons holding different parcels of an idol's property on behalf of the idol. If the wahiwatdar is not fit to be entrusted with the property then he should be removed, but if no one is prepared to ask for his removal then he must be permitted to hold all the property.

[11] With these modifications the plaintiffs will be permitted to sue on behalf of the idol as its next friends. The revision fails except to the extent indicated and is dismissed. But each party will bear its own costs because the plaint as it stands is materially defective.

D.S. *Revision dismissed.*

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## A. I. R. (34) 1947 Nagpur 236 *[C.N. 67.]*

BOSE J.

*Krishnakumar s/o Ganga Prasad Bajpai — Defendant — Applicant* v. *Jawand Singh s/o Jwala Singh — Plaintiff — Non-applicant.*

Civil Revn. No. 318 of 1945, Decided on 5-8-1946, from order of Sub-Judge, 1st Class, Hoshangabad, D/- 26-6-1945.

**(a) Civil P. C. (1908), S. 151 — Suit dismissed under O. 11, R. 21 — Inherent power to restore — Civil P. C. (1908), O. 11, R. 21.**

The Code provides that the remedy of a party whose suit is dismissed for want of prosecution under O. 11, R. 21, Civil P. C., is by way of an appeal or application for review. Hence, the order of dismissal cannot be set aside by invoking the inherent powers of the Court under S. 151, Civil P. C. [Para 4]

('44-Com.) C. P C., S. 151, N. 1, Pt. 19.

**(b) Civil P. C. (1908), S. 151—Mistake of Court.**

If there is one principle more fundamental than any other underlying the whole system of jurisprudence, it is this viz., that no party is to suffer for a mistake of Court when that party is not in any way to blame. This principle will override even the general principles such as that the inherent power of the Court under S. 151, Civil P. C. cannot be invoked when there is an express provision dealing with the matter, etc. [Para 7]

('44-Com.) C. P. C., S. 151, N. 6, Pt. 3.

**(c) Civil P. C. (1908), O. 47, R. 1 — Powers of Court whether limited.**

A Court's powers of review are extremely limited, and unless the matter can fall directly within the provisions of *O. 47, R. 1* it has no power to review its decision. [Para 11]

('44-Com.) C. P. C., O. 47 R. 1, N. 2, Pt. 5.

**(d) Civil P. C. (1908), O. 47, R. 1 — Grounds — Error of law.**

An error of law is not a ground on which a Court can review its decision. [Para 13]

('44-Com.) C. P. C., O. 47 R. 1, N. 15.

**(e) Civil P. C. (1908), O. 11, R. 13 — Affidavit — Necessity of.**

An affidavit is required even in cases where the party is not in possession or control of the documents of which discovery is sought. [Para 13]

('44-Com.) C. P. C., O. 11 Rr. 12 & 13, N. 25.

*Cases referred:—*


1. ('40) I. L. R. (1940) Nag. 538 : 27 A.I.R. 1940 Nag. 349 : 191 I. C. 566, Sheolal v. Jugal Kishore.
2. ('35) 57 All. 242 : 22 A.I.R. 1935 P. C. 85 : 62 I.A. 80 : 155 I. C. 205 (P. C.), Maqbul Ahmad v. Onkar Pratap Narain Singh.
3. ('17) 44 Cal. 929 : 4 A. I. R. 1917 Cal. 44 : 41 I. C. 598 (F.B.), Abdul Karim Abu Ahmad Khan v. Allahabad Bank Ltd.
4. ('25) 3 Rang. 63 : 12 A. I. R. 1925 Rang. 218 : 88 I. C. 751, Maung Khant Gyi v. Ma Thet Hnin.
5. ('27) 14 A.I.R. 1927 Cal. 158 : 98 I. C. 70, Asutosh v. Indu Bhusan.
6. ('39) 26 A. I. R. 1939 All. 497, Mt. Rahmat Bibi v. Chandu Lal.
7. ('31) 18 A.I.R. 1931 Mad. 791 : 133 I. C. 205, Mallappa v. Alagiri.
8. ('35) 31 N. L. R. 53 : 21 A.I.R. 1934 Nag. 234 : 152 I. C. 211, Narayan v. Mitharam.
9. Civil Revn. No. 34 of 1945, D/- 7-1-1946, Ramchandra v. Bhimji.
10. ('32) 19 A. I. R. 1932 Bom. 271 : 138 I. C. 246, Mohanlal & Co. v. Yolibai.
11. ('83) 9 Cal. 923, Khajah Assenoola Joo v. Khajah Abdul Aziz.
12. ('35) 58 Mad. 84 : 21 A. I. R. 1934 Mad. 506 : 151 I. C. 899, Sundara Sivarao v. Gangamma.
13. ('33) 29 N.L.R. 176 : 20 A. I. R. 1933 Nag. 176 : 143 I. C. 584, Raghunath v. Khatum Bi.


*S. C. Dube* — for Applicant.
*R. S. Dabir* — for Non-applicant.

**Order.** — On 4-1-1945 the trial Court directed the plaintiff to make discovery of his account books on 29-1-1945. On the next hearing, 29-1-1945, the defendant complained that no discovery had been made. The Court then fixed the case for 9-4-1945. Since no discovery was made even on that date the defendant asked that the suit be dismissed for want of prosecution under

O 11 R 21, Civil P C This was done for the following reasons set out in the order sheet

[illegible]

(The word defendant in the order sheet is clearly a slip for plaintiff ) It seems that the plaintiff entered the witness box and wanted to depose on oath that he had no account books The Court would not allow him to do this because in its view, he had not complied with the provisions of the Code of Civil Procedure and had not filed an affidavit as the Code requires The order was then signed

[2] Later in the day after the order had been signed (the time of the signing of the order is given as 12 10 P M ) the plaintiff s counsel made two applications asking that the order be set aside The main grounds given were first that the plaintiff s counsel had informed the defendant s counsel that the plaintiff had no account books as he never maintained any This according to the plaintiff s counsel occurred in January 1945 Another ground given was that the plaintiff s pleader was under the impression that as the plaintiff was entering the witness box he would state on oath that he had no account books and consequently was unable to give discovery The application also states that when objection was taken to the want of an affidavit the plaintiff stated that he would be prepared to make an affidavit within half an hour But the Court did not grant this and dismissed the suit under O 11 R 21 Civil P C

[3] The Court entertained this application on the same day and set aside its order on 26 6 1945 The question I have to decide in revision is whether it had jurisdiction to do so and whether it was otherwise proper for it to make such an order

[4] On the question of jurisdiction I am clear that the Court had no jurisdiction Order 43 R 1 Civil P C provides an appeal from an order dismissing a suit for want of prosecution under O 11 R 21 of the Code Order 47 R 1 provides for a review Therefore two distinct remedies are provided in the Code against an order made in the circumstances like the present That being the case it is not possible to attract the provisions of S 151 and invoke the inherent jurisdiction of the Court This was stated in emphatic terms by me in a Division Bench case (which in any event binds me) reported in I L R (1940) Nag 535[1], at p. 549 I stated there (the Honourable the Chief [illegible] to S 151 when the matter is expressly dealt with in the Code and that if they do so they act without jurisdiction and their orders are revisable

[5] Much the same principle is laid down by their Lordships of the Privy Council in 57 ALL 249[2] at p 250 a case under the Limitation Act The proposition contended for before their Lordships was that in a case of hardship the Courts had some judicial discretion to relieve a party from the operation of the Limitation Act but the argument would of course apply to any Act Their Lordships stated

[illegible] or ty to [illegible] r Lord [illegible] matter [illegible] in some [illegible] scretion [illegible] e l m ts [illegible] e with

[6] Other High Courts have taken a similar view and I need only refer to 44 Cal 979[3] 3 Rang 63[4] A I R 1927 Cal 158[5] A I R 1939 ALL 497[6] and A I R 1931 Mad 791[7]

[7] I was however referred to two decisions of this Court 31 N L R 53[8] and Civil Revn No 34 of 1945[9] where a reference under the inherent jurisdiction of the Court was permitted even though an appeal was provided under the Code Those cases are however distinguishable on other grounds If there is one principle more fundamental than any other underlying the [illegible] we [illegible] for [illegible] not in any way to blame That principle overrides even the principles to which I have referred to above In Civil Revn No 34 of 1945[9] it seems that the Court had informed the pleader that it would deal with the application for review presented by him after it had decided another matter It completely forgot its promise it had made to the pleader and dismissed the application in default That of course would at once attract the provisions of S 151 Civil P C The party was in no way at fault He made an application and had a right to have it decided. Instead of hearing it as the Court was bound to do, the C[illegible] through a mistake [illegible] had postpon[illegible] miss the appl[illegible] case like the [illegible] Court [illegible] had [illegible]

[illegible]

Civil P. C. is not an application in execution and is governed for the purposes of limitation by Art. 181 while the High Courts of Bombay, Madras, Patna and Rangoon and the Chief Court of Oudh are of the view that such an application is virtually an application in execution and limitation is governed by Art. 182, Limitation Act. The decisions of the Nagpur Judicial Commissioner's Court and of the Nagpur High Court are also not harmonious. In spite of this voluminous case law, there are, in our view, very few decisions in which the subject has been discussed elaborately and reasoned very closely.

[3] Before entering into the case law on the subject, we propose to approach the question to be answered on broad principles of law and on the historical development of the present S. 144, Civil P. C.

[4] In the first place, there is an essential difference between restitution and execution. Restitution means in law restoring to the party, on the variation or reversal of a decree what has been lost to him in execution of the decree reversed or varied or in consequence of that decree. Execution, on the other hand, is the enforcement of the direction in the executable decree or order—which are usually supposed to be self-contained — and to give effect to them. The right of restitution is not based on any statute or on the mandates of a Court contained in its decree or order but on the inherent jurisdiction which every Court has, to repair the injury done to a suitor as a result of its wrong action or decision—a principle which is contained in the well-recognized maxim *actus curiae neminem gravabit*. Their Lordships of the Privy Council in a case reported in 2 Pat. 10[1] at p. 16 observed thus:

"It is the duty of the Court, under S. 144, Civil P. C., to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved."

[5] In (1871) L. R. 3 P. C. 465[2] which is the leading case in this matter their Lordships observed:

" One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case."

[6] Section 144, Civil P. C. does not create the right of restitution. It merely confers power and prescribes procedure by which a due relief can be given to the injured party. It gives to the Court of first instance a wide power in the matter of causing restitution and determining all questions connected therewith. The Court executing the decree or order is on the other hand bound to enforce the decree or order as it stands and has no jurisdiction either to question it or to travel beyond the same. In fact execution proceeds on the basis that a valid decree exists which is to be executed while restitution is to be caused because a decree or order which existed and which was executed becomes non-existent wholly or partially.

[7] The jurisdiction to cause restitution or to determine all questions in connection therewith lies only with the Court of first instance while the power to execute a decree is either in the Court passing the decree or the Court to which the decree may be transferred for execution.

[8] The fact that the two applications are essentially different is also clear from the historical developments of S. 144. In the Civil Procedure Code of 1859, while there were express provisions for execution of decree or order there was no express provision for causing restitution. The need for such a provision was realized when in a case reported in 10 M. I. A. 203[3] the Right Honourable Turner L. J. observed as under:

" There is no doubt that, according to the law of this country—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests, as their Lordships apprehended, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process, or by a new suit or action."

[9] It was with a view to bring the Civil Procedure Code in line with the aforesaid observations of their Lordships that the Code was amended and S. 583 was introduced in a chapter dealing with appeals. The section ran thus:

" When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits."

After the introduction of the aforesaid section in the Civil Procedure Code, the controversy arose regarding the Article of the Limitation Act by which an application under S. 583 would be governed. In 10 Mad. 66[4] the learned Judges express the view that the application would be governed by Art. 179 (present Art. 182), Limitation Act. The Allahabad High Court however

governed by s 16, the reason being that the Act applies to the whole of British India The Legislature must be presumed to know that the Oudh Estates Act did not lay down the formali

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an exception could easily have been made in 1871 when the Registration Act was passed

[56] It has been argued with considerable emphasis for the appellant that a general Act cannot repeal or alter or derogate from the provisions of the special Act and there being a provision in the special Act, i e, that cl. (8) requires an authority to be in writing but not to be registered and cl (1) makes no mention of registration the Registration Act will not apply to the Oudh Estates Act The maxim of *generalia specialibus non derogant* is invoked The passage in Maxwell's Interpretation of Statutes at p 155, s 3 does not advance the appellant's case

earlier legislation" are important The question as to what formalities are required before a Hindu can give authority to his widow to adopt a son coming under cl 1 of s 22 is not dealt with by the Oudh Estates Act According to the same authority at p 160

'But if there be in the Act or in its history something

unlikely that any exception was intended in favour of the special Act, the maxim under consideration ceases to be applicable'

No question, therefore, of altering that Act arises nor does any question of incorporation of the special Act into the general Act arise

[57] Learned counsel also refers to Craies on Statute Law, at pp 321 and 322 to the effect that a subsequent general Act does not refer to a prior special Act by implication unless there is a clear intention to do so At p 324, however, it is pointed out that the rule must not be pressed too far and it is laid down that if the provisions of the two Acts are absolutely repugnant and inconsistent with one another, the Courts have no alternative but to declare the prior special enactment repealed by the subsequent general Act

[58] Lastly it was contended that the letters Exs A 189 and A 191 do not come within the mischief of the Registration Act for the reason that Ex. A-189 confers a joint authority and is therefore bad in law, Ex A-191 merely confirms the authority conferred in Ex A 190 and therefore does not confer any express authority for the first time but merely acknowledges an authority made previously. It is urged that Ex A 190 is the only letter which can be regarded as an authority to adopt This letter, according to the appellant's learned counsel was written for the purpose of the Taluqdari Act and his immediate object was to comply with the Taluqdari Act and not confer an authority under the Registration Act In other words, the taluqdar did not know at that time and as he wrote it under a mistaken belief the document would not operate as an express authority to adopt but it is admissible in evidence as an implied authority to adopt Reliance is placed on Mulla's Hindu Law, p 518, para 452 (2), 49 Mad 969[13] and 65 I A 93[14] This argument was not put forward either before the trial Court or before the Divisional Bench I am of opinion that this contention is not sound The passage in Mulla's Hindu Law is to the following effect:

adopt"

This is founded upon the decision of the Privy Council just referred to above There is however a passage in Gupta's Hindu Law (1945 Edn) at p. 939 which runs thus

"28 In Bengal and Benares a widow may adopt

Reference is made to 12 M I A, 397[15] and 53 Bom 242[16] for the respondent

[59] The case in 49 Mad 969[13] was a case under the law prevalent in Madras In that case the adopted boy had been brought to the house of the adoptive father on 1 6 1916 for the

been settled On 10th June, however, the adoptive father died On 24th June the boy was adopted by the widow and the question was whether the implied authority to adopt could be inferred The evidence that oral authority was given by the husband was disbelieved and the question arose whether the husband's conduct could lead to the inference that he gave an implied authority to his wife The passage in

12 M. I. A. 397[16] was interpreted to mean that under the Mahratta School an assent can be assumed where the husband has not intimated his prohibition while in Bengal and Southern India there must be positive or affirmative consent given by the husband. The word "express consent" used in the Privy Council decision was thus explained away. The adoption was held valid.

[60] The decision in 65 I. A. 93[14] was also from Madras. The dispute in that case was between the adopted son and the nearest sapindas of the last male holder who denied the validity of the adoption. In that case the child adopted by the husband died in his infancy. The husband had associated his wife in this adoption. After his death, the widow made a second adoption and it was held that no implied authority could be inferred and in order to constitute an implied authority there must be circumstantial evidence of a cogent character. In the course of the judgment their Lordships remarked:

"There is nothing to show that the husband ever contemplated a second adoption or that he was prepared to leave the selection of another boy to his wife. Their Lordships are not laying down that the requisite authority must necessarily be express, but they agree with the District Judge that 'in order to constitute an implied authority there must be circumstantial evidence of a cogent character ......"

[61] This observation which is applicable to the law in Madras does not decide the point arising before us. In 58 Bom. 242[16] it was held that under the Benares School of Hindu Law, express authority by the husband is essential for the validity of an adoption by the widow.

[62] Apart from authority, it seems to me that it is not possible to construe implied authority in the present case. Exhibit A-190 does confer an express authority by common consent, but if it fails on the ground that it is not registered, it cannot be looked at for the purpose of inferring implied authority and confessedly there is no other evidence apart from the letters circumstantial or otherwise which may lead to the inference that the implied authority was conferred. Accordingly, I would dismiss the appeal with costs.

[63] **Walford J.** — As a member of the Full Bench, I have again heard the appeal, and nothing has been advanced on behalf of the plaintiff-respondents which would induce me to alter the opinion I have already expressed. In fact on hearing the elaborate arguments advanced by the appellant, which have been in some respects on new lines from those advanced before the Divisional Bench I am more than ever convinced that the view I took is correct. I, therefore, adhere to the decision given by me in the appeal, and hold that Exs. A-189, A-190 and A-191 are genuine documents whereby Raja Chandra Shekhar gave his consent to Rani Subhadra Kunwar to make an adoption after his death and that in law these documents were not required to be registered.

[64] I would therefore allow the appeal, set aside the decree passed by the learned Civil Judge and dismiss the suit with costs throughout. Two clerical errors have been brought to my notice in my judgment on p. 448 of the printed record. The first of these to be found is at line 10 wherein I said "son of Raja Kashi Prasad." This ought to have been "son of Raja Chandra Shekhar." Again at line 21 in the concluding portion the words occur "and decree the suit.": the words should have been "and dismiss the suit." Let these errors be corrected.

[65] **By the Court.**— The majority opinion is that the appeal be allowed and the suit dismissed with costs. We, therefore, allow the appeal, set aside the decree of the lower Court and dismiss the suit with costs throughout.

G.N. *Appeal allowed.*

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## A. I. R. (34) 1947 Oudh 194 *[C. N. 66]*

MISRA AND MADELEY JJ.

*Mustafa Ali Khan—Applicant* v. *Commissioner of Income-tax, U. P., C P. & Berar —Opposite Party.*

Applications for leave to appeal to Privy Council: Privy Council Appeals Nos. 19 to 22 of 1944, Decided on 24-8-1945, from the Judgment of High Court, *reported in 32 A. I. R. 1945 Oudh 44.*

**Income-tax Act (1922), S. 66A (3) — Leave to appeal —Substantial questions of law—Income from malikana, self-grown forest and annuity—Liability to tax—Civil P. C. (1908), S. 110.**

The question whether income from malikana or income from self-grown forests is liable to income-tax which involves the question whether it comes within the definition of agricultural income, is a substantial question of law. Similarly, the question whether certain payments by way of annuity with interest are liable to income-tax which question has not yet been decided by the Privy Council is a substantial question of law within the meaning of S. 110, Civil P. C. [Paras 7, 8]

('44-Com.) C. P. C., S. 110, N. 17.

*H. K. Ghose,*—for Applicant.

*S. C. Das*—for Opposite Party.

**Order.**—This order will cover four applications under S. 66A (2), Income-tax Act. Nos. 19 and 22 of 1944 are applications made by the assessee whose estate is under the Court of Wards. The Income-tax Commissioner has also applied for leave and his applications are Nos. 20 and 21. Applications Nos. 19 and 20 relate to the assessment year 1939 40. Applications Nos. 21 and 22 relate to the assessment year 1940 41. In the first two applications we are concerned with an order of this Court dated 29-9-1944, in Civil Reference No. 10 of 1942.* In the

* *Reported in 32 A. I. R. 1945 Oudh 44.*

second two applications we are concerned with an order of this Court dated 9 10 1944, in Civil Reference No 3 of 1944

[2] Three questions were involved (1) Whether income from "malikana" is liable to income-tax, (2) whether income from forest is liable to income tax, and (3) whether certain payments of annuity with interest were liable to income tax

[3] In Nos. 19 and 20 the value of the disputed items is

| | | |
|---|---|---|
| Forest | .. | Rs 21 040 |
| Malikana | ... | 6271 |
| Annuity and interest | .. | 61,797 |

In Nos 21 and 22 the items are

| | | |
|---|---|---|
| Forest | .. | Rs 9330 |
| Malikana | ... | 3718 |
| Annuity and interest | ... | 70,865 |

[4] On all these three questions this Court

appeals from decrees of a High Court

[6] The valuation of the appeals cannot be directly estimated as in the case of some civil appeals, but we think that these applications properly come under S. 109 (a) as the final order involves a sum of money in each case of over Rs 10 000 In the case of the annuity in respect of which the income-tax department has applied the annual payment is Rs 145 862 The assessee applies for permission to appeal in respect of the sale price of forest produce and so called malikana 'The malikana is fixed for each village once for all and is payable to the Utraula estate for ever" Income tax leviable upon the sale price of forest produce varies from year to year, but it is obvious that it must in the aggregate amount to a very large sum of money.

[7] As we agreed with the Income tax Tribunal on all the questions involved there must be, under S. 110, Civil P. C, some sub-

siderations, raises an important question as to what is to be considered agricultural income. The decision regarding the annuity raises an important question of income tax law which, so far as we are aware, has not been decided by their Lordships of the Privy Council. The question whether income derived from self grown forests is agricultural income within the meaning of the Act is obviously one of very great importance to the Government and the public and is by no means free from difficulty.

[9] In view of these considerations we allow these four applications for leave to appeal to the Privy Council.

K S. *Leave granted.*

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## A. I. R. (34) 1947 Oudh 195 *[C N 67]*

### FULL BENCH

MISRA, KAUL AND KIDWAI JJ

*Deputy Commissioner, Sultanpur — Appellant v. Kallu Mal—Respondent.*

First Civil Appeal No 21 of 1941, Decided on 9 4 1947, from order of Special Judge, 1st Grade Sultanpur, D/ 26 10-1940

**(a) U P Court of Wards Act (4 [IV] of 1912), S 18, Proviso 2 — Words "without discharging the liabilities in the manner provided in this chapter' —Meaning of—Interpretation of statutes—Words—Plain and ordinary meaning**

It ...

... an entirely different meaning [Para 10]

The words "without discharging the liabilities thereof in the manner provided in this Chapter used in S 18 U. P Court of Wards Act should be given their plain and ordinary meaning They do not mean 'without ascertaining the liabilities thereof in the manner provided in Chapter 4 ' So that even if the liabilities of a ward are ascertained before the estate was released from the superintendence of the Court of Wards if they are not discharged before the release, the debt would not be extinguished 15 Luck 308 27 A I. R 1940 Oudh 107 185 I C 290, *OVERRULED* [Paras 12 13]

**(b) Limitation Act (1908) S 3—The Act generally speaking bars remedy but does not extinguish right** [Para 10]

*(42 Com)* Limitation Act, Pre N 16 Pt 1, S 3 N 14

*Case referred —*

1. (40) 27 A I R 1940 Oudh 107 15 Luck 308 185 I C 290, Anand Behari Lal v Deputy Commissioner, Barabanki

*Nasirullah Beg*—for Appellant

*B K Dhaon*—for Respondent.

**Judgment** —The following question has been referred by a Division Bench to a Full Bench

'Is the view taken by a Bench of this Court in A I R 1940 Oudh 107[1] correct and do the words

[2] The facts material for the determination of the appeal which led to the making of the

reference are briefly as follows: Raja Mohd. Mehdi Ali Khan was the taluqdar of Hasanpur estate in the district of Sultanpur. On 22-3-1930, he executed a deed of mortgage for a consideration of Rs. 11,000 in favour of Kallu Mal. The property mortgaged comprised five villages. In the year 1931 an inquiry under S. 9, Court of Wards Act was made into the circumstances and the extent of indebtedness of Raja Mohd. Mehdi Ali Khan. In the course of this inquiry Kallu Mal produced the deed before the Deputy Commissioner of Sultanpur and got his signature upon it. On 10-4-1931, there was published in the gazette a notification under S. 8, Court of Wards Act declaring the Raja to be a disqualified proprietor. On 18-4-1931, the Court of Wards assumed superintendence of Hasanpur estate under S. 15 of the Act. On 25-4-1931, a notice under S. 17, Court of Wards Act, calling upon all persons having claims against the Raja or his property to notify the same in writing to the Deputy Commissioner, Sultanpur, within six months from the date of its publication, was published in the gazette. Raja Mohammad Mehdi Ali Khan died on 6-8-1931, but the Court of Wards continued to retain superintendence of the estate under S. 45 of the Act. On 21-3-1932, the estate was released in favour of Raja Mohammad Mehdi Ali Khan's successor, Raja Ahmad Ali Khan, but again the Court of Wards assumed charge of the estate on behalf of the new taluqdar. On 2-4-1932, another notice under S. 17, Court of Wards Act was issued, but before expiry of six months from the date of this notice, the estate was released from the superintendence of the Court of Wards on 1-10-1932, in favour of Raja Ahmad Ali Khan. On 18-5-1936, Raja Ahmad Ali Khan made an application under S. 4, Encumbered Estates Act. This was in due course forwarded to the Special Judge, Sultanpur, for disposal. On 6-8-1936, Raja Ahmad Ali Khan filed his written statement under S. 8, Encumbered Estates Act. This did not make any mention of Kallu Mal's debt. On 17-12-1936, Kallu Mal preferred a claim on the basis of his mortgage against Raja Ahmad Ali Khan. On 14-3-1937, the Raja filed his replication contesting the claim on two grounds: (1) That the deed was inadmissible in evidence under S. 22, Court of Wards Act, and (2) That the debt due on the basis of the mortgage was extinguished because Kallu Mal had failed to notify to the Deputy Commissioner as required by S. 17 of the said Act.

[3] On 23-8-1938, it was admitted by the learned counsel for Raja Ahmad Ali Khan that the estate was released on both the occasions, when its superintendence was assumed by the Court of Wards, without full discharge of the liabilities of the ward. It was held by the trial Court that S. 22, Court of Wards Act could not apply to the deed which formed the basis of Kallu Mal's claim because the first notice under S. 17 was issued when superintendence of the estate was assumed on behalf of Raja Mohammad Mehdi Ali Khan and S. 22 barred the admission of any evidence of the deed against the ward, (Raja Mohammad Mehdi Ali Khan) while the claim was made not against him but against Raja Ahmad Ali Khan. As regards the second notice issued under S. 17, it was pointed out that the estate was released before the expiry of six months from the date mentioned in the said notice, and hence S. 22 could not apply. As regards the second plea based on S. 18, Court of Wards Act it was held that inasmuch as on each of the two occasions when superintendence of the estate was assumed by the Court of Wards it was released from superintendence without discharging the liabilities thereof, therefore, under Proviso 2 to that section the claim could not be said to have been extinguished. The learned Special Judge decreed Kallu Mal's claim for Rs. 22,000 and costs with future interest from 18-5-1936, till realization at 3¼ per cent. per annum.

[4] Raja Ahmad Ali Khan filed the appeal which has given rise to the present reference on 28-1-1941. He died on 14-4-1945 before the appeal was heard and was succeeded by his son Raja Mohd. Raza Ali Khan, whose name was substituted on the record. On 30-7-1945, the Court of Wards again assumed superintendence of the estate—this time on behalf of Raja Mohammad Raza Ali Khan. On 15-9-1945, again a notice under S. 17, Court of Wards Act was issued. The Deputy Commissioner, Sultanpur, as Manager, Court of Wards, Hasanpur estate, applied for substitution of his name as guardian of Raja Mohd. Raza Ali Khan on the record. This was done, and the appeal which was continued by him came up for hearing before a Divisional Bench of which two of us were members.

[5] Three points were urged before the Division Bench on behalf of the appellant: (1) That the deed which formed the basis of Kallu Mal's claim was inadmissible in evidence under S. 22, Court of Wards Act. (2) That the failure of Kallu Mal to notify his claim to the Deputy Commissioner in response to the notice under S. 17, Court of Wards Act issued in the life-time of Raja Mohd. Mehdi Ali Khan had the effect of extinguishing the debt under S. 18, Court of Wards Act, and (3) That in any case Kallu Mal's failure to notify his claim to the Deputy Commissioner in response to the notice issued under S. 17, when superintendence of the estate on behalf of Raja Raza Ali Khan was assumed extinguished the

debt The Division Bench upheld the respondent s contention that S 22, could not be invoked by the appellant to exclude the deed of mortgage from being admitted in evidence As regards the second contention it was pointed out on behalf of the respondent that admittedly on each occasion when superintendence of the estate was assumed by the Court of Wards on behalf of Raja Mohd Mehdi Ali Khan or his successor, Raja Ahmad Ali Khan, it was released before the liabilities thereof were discharged, and accordingly the debt could not be deemed to be extinguished in view of the proviso to S 18 To meet this difficulty, the learned counsel for the appellant relied on the decision of this Court in 15 Luck 308[1] and contended that the words, "without discharging the liabilities thereof in the manner provided in this Chapter" used in the said proviso to S 18 had the same meaning as it was held by this Court they had in S 52, Court of Wards Act, that is, they meant that the debt would not be deemed to be extinguished if the estate was released without ascertaining the liabilities thereof His argument was that if the liabilities were ascertained before the estate was released, though they were not discharged before the release of the estate from the superintendence of the Court of Wards, the debt would be extinguished This contention was not accepted by the Division Bench, and accordingly it referred the question mentioned in the opening portion of this judgment to a Full Bench

[6] The third contention raised on behalf of the appellant was also repelled, but we are concerned only with the question that has been referred to the Full Bench Sections 52 and 18, Court of Wards Act, read as follows

"52 When the Court of Wards after assuming

release shall be excluded in computing the period of limitation applicable to suits or applications for the recovery of all claims outstanding against the ward at the date of such notice.

'18. Subject to the provisions of S 20 every claim of the nature specified in S 17 against the ward or his property, other than debts due to and liabilities incur

Provided also that the provisions of this section

liabilities thereof in the manner provided in this chapter

Provided further, that nothing in this section shall apply to a mortgagee in possession of immoveable property of the ward '

[7] It will be noticed that the language used in the opening portion of S 52 "when the Court of Wards after assuming the superintendence of the property of a ward *releases the same without discharging the liabilities thereof in the manner provided in Chapter IV*" is the same as used in Proviso 2 to S 18 '*Provided also that* the provisions of this section shall not be deemed to extinguish any such claim in any case in which the Court of Wards after assuming superintendence of such property releases the same from its superintendence *without discharging, the liabilities thereof in the manner provided in this chapter*"

[8] The material facts in *Anand Behari Lal Khandelwal's case*[1] were that one Munshi Murlidhar held a money decree against Pyare Lal Pande, who was a taluqdar Superintendence of Pyare Lal Pande's estate was assumed by the Court of Wards, and a notification as required by S 17, Court of Wards Act, was issued on 31 3-1931 Murlidhar notified his claim and it was accepted by the Board of Revenue for a sum of Rs 1604 11 0 Murlidhar died in April 1934 and was succeeded by his widow Mt Basanti Devi Thereafter the Deputy Commissioner in charge of Court of Wards made an application on 25 11 1935, under S 4, Encumbered Estates Act In this application, Mt Basanti Devi's decree was admitted as a subsisting debt It was again admitted as a subsisting debt in the written statement filed by the Deputy Commissioner under S 8 Encumbered Estates Act Mt Basanti Devi filed her

In the replication filed by the Deputy Commissioner on 14 9 1936, the debt was again admitted to be subsisting During the pendency of the proceedings under the Encumbered Estates Act, it was agreed upon between the Court of Wards and Mt Basanti Devi in February 1937, that she would be paid a sum of Rs 1600 which she would accept in full satisfaction of her decree Subsequently, an application under O 6, R 17, Civil P C was made by the Deputy Commissioner, Barabanki, praying for the amendment of his application dated 25 11 1935 and the

Devi s name should be deleted from the list of creditors The learned Special Judge allowed the application and holding that the debt had become time barred before the application under

S. 4, Encumbered Estates Act was made dismissed the claim. Basanti Devi appealed against this decree. One of the contentions put forward on behalf of the appellant was that if the Court of Wards were to release the estate from its superintendence without discharging the debts of Pyare Lal Pande, then by virtue of the provisions of S. 52, Basanti Devi would in execution of her decree, be entitled to exclude in computing the limitation applicable to her application the period between the publication of the notice under S. 17 and the date of the release of the estate. Accordingly, if the estate, it was argued, were released when the appeal was being heard, Basanti Devi would be entitled to exclude in computing the period of limitation for her application the period between 31-3-1931, when the notice under S. 17, Court of Wards Act was issued and the date of the release and her application for execution of the decree which was passed on 13-4-1930 would be within time. This, it was contended, would be wholly anomalous. With regard to this argument the learned Judges observed as follows:

" In our view the contention of the learned counsel for the appellant on this point is based upon misconception of the provisions of S. 52, U. P. Court of Wards Act. The confusion is created by the use of the word "discharging" in S. 52. After a careful consideration of the language of the relevant sections we are of opinion that S. 52 applies to cases where the estate is released from the superintendence by the Court of Wards before the ascertainment of debts, and Ss. 21 and 20 apply where the debts are ascertained by the Collector under Chap. 4 of the Act. Chapter 4 of the Court of Wards Act deals not with discharging the liabilities of the ward but with their ascertainment only, and in our opinion the words, "without discharging the liabilities thereof in the manner provided in Chap. 4' in S. 52 mean and stand for "without ascertaining the liabilities thereof in the manner provided in Chap. 4". We are, therefore, of opinion that the argument of the learned counsel for the appellant which is based upon misconception of the meaning and application of S. 52, U. P. Court of Wards Act, has no force."

It will be seen from the observations reproduced above that according to the view taken by the Bench, the words "without discharging the liabilities thereof in the manner provided in Chap. 4" mean and stand for "without ascertaining the liabilities thereof in the manner provided in Chapter IV."

[9] It was contended by the learned counsel for the appellant that inasmuch as the language of proviso 2 to S. 18 and S. 52 is identical, it should be taken that the debt would be deemed to be extinguished under S. 18 if the liabilities of a ward were ascertained under Chap. 4 even though the estate was released before such liabilities were discharged. With the greatest respect for the learned Judges composing the Division Bench which decided *Anand Behari Lal Khandelwal's case*[1] we are unable to concur in the view taken by them.

[10] It is a well-settled rule of construction that unless there are reasons to the contrary, words used in a statute shall be given their plain and ordinary meaning. Nor is it, in our opinion open to a Court in the absence of overwhelming reason to the contrary to say that certain words used in a statute " stand for" certain other words with entirely different meaning. When S. 52 says that a certain period shall be excluded in computing limitation if the property of a ward is released from superintendence without discharging the liabilities thereof, it is not permissible, in the absence of very strong reasons to substitute "ascertain" for "discharge." The learned Judges appear to have been impressed by the supposed anomaly which would arise if the word " discharge " used in the section were given its plain and ordinary meaning. The anomaly envisaged is referred to at pp. 316 and 317 of the report. It was argued on behalf of the appellant in that case that his application which was held to be time-barred would "if the Court of Wards were to release the estate" without discharging the liabilities of Pyare Lal Pande when the appeal was being heard be within time, and this, it was pointed out, would be highly anomalous. The decree in question was dated 30-4-1930. The notification under S. 17, U. P. Court of Wards Act was issued on 31-3-1931 by which date one day short of eleven months had expired. A period of two days less than a year from 31-3-1931 up to 29-3-1932 was excluded in computation of limitation by virtue of the provisions of cl. (3) of S. 21, Court of Wards Act. Time began to run again from 30-3-1932 and from that date the decree-holder was entitled to a further period of 25 months and one day, which would expire on or about 1-5-1934. As there was an acknowledgment of the liability in writing by the Court of Wards on 29-3-1932 the period of limitation would be extended up to 29-3-1935, and as the application under S. 4, Encumbered Estates Act was made on 25-11-1935, the decree became time-barred several months before that date. But as the notification under S. 17, Court of Wards Act was issued on 31-3-1931 and if the estate was released without discharging the liabilities of the ward on a day in November 1939 when the appeal was heard Basanti Devi would be entitled under S. 52 to exclude the whole of this interval in computing the period of limitation for an application for execution of her decree. This argument appears to have weighed with the learned Judges who decided

*Anand Behari Lal Khandelwal s case*[1] and in order to meet it they were obliged not only to put a forced construction upon the language of s 52 but indeed to alter the language of the statute by substituting the word ascertain for ' discharge ' in the section We may point out with the greatest respect that the argument advanced by the appellant in that case does not appear to us to be sound The argument is based on an assumption for which there was no warrant at the time the appeal was heard It was contended that if the Court of Wards were to release the estate today It is clear from the manner in which the argument was put that the estate had not been released by the time the appeal came up for hearing and it is neither sound logic nor good law to allow the determination of an appeal to be influenced by suppositions or assumptions which do not exist Even if we were to assume that the contingency contemplated in the argument did actually arise we are unable to see that it would create any anomalous situation May be that if the estate was released by the Court of Wards without discharging the liabilities of Pyare Lal Pande Basanti Devi would be entitled to present an application for execution of her decree which in view of the provisions of s 52 Court of Wards Act would be within time It was contended by the learned counsel

on a future date Whether the application is or is not within time is a matter to be determined on the facts and circumstances as they exist when the matter arises for consideration The law of limitation generally speaking bars the remedy it does not extinguish a right On the date on which Basanti Devi s application for execution of decree was presented it was, according to the circumstances then existing barred by the law of limitation It was possible that the release of the estate by the Court of Wards without discharging the liabilities of the ward, may bring into existence circumstances which would by virtue of the provisions of s 52 Court of Wards Act entitle her to present an application which would be held to be not barred by the law of limitation The decision on the previous application that it was barred by limitation should not in our opinion, stand in the way of the Court executing the decree on an application presented at some time in

which that application was presented it was barred by the law of limitation The question which would come up for consideration when another application is presented would be different The Court would then be called upon to consider whether the application as then presented was or was not within time The supposed anomaly in the argument of the learned counsel for the appellant in *Anand Behari Lal Khandelwal s case*[1] was in our opinion not real

[11] The only reason mentioned in the report for putting a forced construction on the language of s 52 U P Court of Wards Act was that Chap 4 Court of Wards Act deals not with discharging the liabilities of the ward but with their ascertainment only We are with the greatest respect for the learned Judges who decided *Anand Behari Lal Khandelwal s case*[1] unable to accept this view The U P Court of Wards Act consists of eight chapters headed as follows

Chapter I—Preliminary

Chapter II—The Court of Wards This deals with the constitution control distribution of business conduct of business and the manner in which the powers of the Court of Wards are to be exercised

Chapter III—Assumption of superintendence of persons and property

Chapter IV—Ascertainment of debts

Chapter V—Guardianship and management

Chapter VI—Release of persons and property from superintendence

Chapter VII—Suits

and Chapter VIII—Miscellaneous

It will be noticed that there is no separate chapter dealing with the discharge of debts Turning to Chap 4 we find that it consists of eight sections — ss 17 to 24 Section 17 deals with notice to claimants and presentation of claims

Section 18 deals with the effect of failure to notify claims as required by s 17

Section 19 deals with the powers of Collector in regard to claims

Section 20 relates to prosecution of claims in civil Court

Section 21 lays down that on the publication of a notice under s 17 no fresh proceeding in execution of any decree against the ward or his property shall be instituted in nor shall any attachment or other process in any such proceeding [illegible] until the [illegible] tioned in [illegible] order or decree of the civil Court allowing the claim in any suit or proceeding referred to in s 20

Section 22 says that documents not produced before the Collector would be inadmissible in evidence in certain cases.

Section 23 deals with stay of costs against the property of the ward and

Section 24 authorises the local Government to invest any person with powers of a Collector under this chapter.

Section 19 reads as follows:

"*19.* (1) The Collector shall decide which of the claims notified or deemed to have been notified under S. 17 or 18 are to be allowed and which are to be disallowed in whole or in part and on his decision being confirmed by the Court of Wards, shall give written notice of the same to the claimants.

(2) When a claim which has been received under the first proviso of S. 18 is allowed, the Collector may disallow payment in part of the interest which has accrued since the publication of the notice under S. 17.

(3) Where a claim allowed under sub-s. (1) not being a claim merged in a decree is due or payable the Collector may if such claim cannot be at once discharged fix the rate of interest to be paid thereon from the date of his decision to the date of payment and discharge of such claim:

Provided that if such claim is not discharged by the Court of Wards within two years from the date of the decision of the Collector allowing it any order made under this sub-section reducing the contractual rate of interest shall be deemed to be inoperative.

(4) The Collector may fix the rate of interest to be paid on the claim from the date of such decision to the fixed date aforesaid or to a date two years from the date of the decision, whichever may be the longer period:

Provided that if such claim is not discharged by the Court of Wards on or before the date up to which the interest has been fixed by such order the order reducing the contractual rate of interest shall be deemed to be inoperative.

(5) In no case shall the rate of interest fixed under sub-s. (3), or sub-s. (4), be less than six per centum per annum.

(6) The action of the Collector under sub-ss. (2), (3) and (4) of this section shall be subject to the confirmation of the Court of Wards and shall not be open to question in any civil Court."

The words "if such claim cannot be at once discharged" in sub-s. (3) of this section clearly show that so far as possible it is the duty of the Collector to discharge at once the debts mentioned in the sub-section. The proviso which follows contemplates the discharge of claims which are not paid off at once within two years from the date of the decision of the Collector as regards the fixing of the rate of interest to be paid thereon. Similarly, the proviso to sub-s. (4) also deals with the discharge of debts. It is true that Chap. 4 is headed "Ascertainment of debts", but as shown above there can be no doubt that it deals with the manner in which the debts are to be discharged. There is, as pointed out in the judgment of the Division Bench which made the reference no other chapter which deals with the discharge of liabilities. Section 36 does mention "the liquidation of debts payable by the ward", but that is a provision laying down how the income of the estate is to be used and to borrow the language of the Division Bench "the priorities of the various demands." The chapter in which S. 36 finds place is headed "Guardianship and management" and does not deal with discharge of debts.

[12] A reference to S. 8 of the Act shows that one of the grounds on which proprietors may be deemed to be incapable of managing or unfit to manage, their own property, is "owing to their failure without sufficient reason to discharge the debts and liabilities due by them." As is clear from the scheme of the Act, it was passed to preserve large landed estates from being wasted by mismanagement, extravagance or incapacity of their proprietors. It was this anxiety which induced the Legislature to enact provisions which materially alter the ordinary law governing the rights of debtors and creditors. It provides that persons having claims against the person and property of a ward shall notify them to the Collector after a notice under S. 17 has been published. If they fail to do so, and produce for the inspection of the Collector the documents which form the basis of their claims, such documents become inadmissible in evidence against the ward in any suit brought to enforce the claim founded upon them. In certain contingencies the claims themselves are extinguished. It is in our opinion only reasonable to infer from the language used in Proviso 2 to S. 18, and of S. 52, that these drastic penalties were not intended to be imposed if the main object with which the superintendence of the estate was assumed by the Court of Wards (that is the discharging of the liabilities due therefrom) was not achieved and the estate was released. In these circumstances the creditors of a ward are entitled to exclude the interval between the date of notice under S. 17, and the release of the estate in computing the period of limitation for the institution of a suit or for filing an application for execution of a decree in respect of their claims.

[13] We are for reasons given above of opinion that the view of law taken in the case of *Anand Behari Lal Khandelwal* v. *Deputy Commissioner, Barabanki*[1] of S. 52, U. P. Court of Wards Act is not correct and that the words "without discharging the liabilities thereof in the manner provided in this Chapter" used in S. 18, U. P. Court of Wards Act should be given their plain and ordinary meaning. They do not mean "without ascertaining the liabilities thereof in the manner provided in Chap. 4." We answer the reference accordingly.

N.S.D. *Answered accordingly.*

**A I R (34) 1947 Oudh 201 [C N 68]**
MISRA AND KIDWAI JJ

*Tirbhauan Datt and others — Objectors — Appellants v Pashupat Pratap Singh — Decree holder — Respondent*

Execution Decree Appeal No 8? of 1943 Decided on 21 3 1947 from order of Addl Civil Judge Fyzabad D/ ?7 9 1943

U P Encumbered Estates Act (25 [XXV] of 1934) S 9 (5) — Effect of sub section on execution —Non determination of sum payable by non applicants — Execution against non applicants

By a special law laid down in S 9 ( ) the general

*Cases referred* —
1 (40) I L R (1940) All 504 27 A I R 1940 All 395 189 I C 647 Murar Lal v Mt B bi
2 (42) 1942 O W N 78 29 A I R 1942 Oudh 248 17 Luck 597 199 I C 116 Har Charan Lal v Sukha Nand
3 (42) 1942 O W N 463 29 A I R 1942 Oudh 482 20? I C 111 Ahmad Ali Khan v Sheo Shankar Singh

*Niamatullah and Naimullah* — for Appellants
*Hyder Husain and Jagdish Chandra* — for Respondent

**Judgment** —On 26 11 1929 the respondent Raja Pashupat Pratap Singh obtained from the Court of the Civil Judge Fyzabad a decree for the possession of some property mesne profits and Rs 1036-? 0 as costs against Ram Audh appellant 2 Ram Naresh the predecessor of the other appellants and Jadunath Pandey On 9 8 1933 the mesne profits were determined to be Rs 2689 15 9 The decree holder applied for execution of the decree for costs on 14 4 1932 and on 29 11 1933 he applied for execution of the decree for mesne profits By an order dated 7 6 1934 the two execution applications were consolidated and the Deputy Commissioner before whom the matter was pending for sale of the property was directed to proceed with both of them For some reason or other the proceedings remained postponed when on 21 4 1936 Jadunath applied under S 4 Encumbered Estates Act and showed half the decretal amount in the list of his debts

[2] The application was forwarded in due course to the Special Judge Second Grade Fyzabad The Raja made a claim for the whole of the decretal amount and thereafter on the application of Jadunath Ram Naresh and Ram Audh were also impleaded as co debtors When they came before the Court they also admitted their liability under the decree to the extent of a half The Special Judge however did not accept their admissions as proof of the respective shares and decreed the whole amount due in respect of mesne profits against the landlords applicants Jadunath and the other members of the joint family of which he was the head He did not apportion any sum as being due from the co debtors nor did he say anything about the costs of the original suit

[3] The Raja decree holder appealed to the District Judge in respect of costs In this appeal he did not implead Ram Naresh and Ram Audh and he only wanted a decree for an additional sum of Rs 1036 8 0 for the costs of the original suit Jadunath again raised the question of apportionment and the District Judge held that

What amount of the sum of Rs 1036 8 0 is due from the applicants and what sum is due from the non applicants ?

[4] The Special Judge found that the liability was joint and several and that consequently the decree holder was entitled to recover the whole amount from the applicants or from the co debtors or from both of them On receipt of this finding the District Judge passed a decree

Jadunath remarked before the

decision of the High Court this was also the view taken in I L R (1940) ALL 504 [1] As a result of these proceedings no part of the liability under the decree was apportioned and made payable by the non applicants The remarks of the Special Judge in his finding on the issue remitted to him cannot be of any assistance to the decree holder because that finding was given behind backs of Ram Naresh and Ram Audh in a proceeding to which they were no parties

[5] It appears that all this time the proceedings in execution initiated in 1932 and 1933 still remained pending and that the decree holders applied for their revival sometime at the end of 1942 or the beginning of 1943 Ram Naresh and Ram Audh objected to these proceedings under S 47 Civil P C and pleaded that no part of the liability having been apportioned against them by the Special Judge proceedings in execution could not be taken against them in respect of the decree The learned Additional Civil Judge of Fyzabad has rejected this plea and has ordered execution to proceed The judgment debtors have now come up in appeal to this Court The sole point invol th peal is

is made. At present all that the insolvent prayed for was that he should be informed of the amount which the Official Receiver had in hand. So far no occasion has arisen for determining whether Patram would be entitled to the indulgence which the Legislature gives him under S. 35, and the Court is not called upon to ascertain the amount which when deposited would enable him successfully to obtain annulment of his insolvency.

[5] The revision application is, therefore, allowed. The orders passed by the lower Courts regarding the rate of interest are set aside. The case will go back to Small Cause Court with a direction that the learned Judge will inform the insolvent of the exact amount which stands to his credit with the Official Receiver. The creditors opposite-parties will pay Patram's costs of this Court and of the lower appellate Court.

D.S. *Revision allowed.*

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## A. I. R. (34) 1947 Oudh 204 *[C. N. 70.]*

GHULAM HASAN C. J.

*Shambhu Dat — Defendant — Appellant* v. *Harihar Prasad — Plaintiff — Respondent.*

Second Appeal No. 405 of 1941, Decided on 20-1-1947 against order of Civil Judge, Gonda, D/- 22-8-1941.

Civil P. C. (1908), S. 91—Applicablity—Village pathway—Suit for demolition of constructions on.

A village pathway was used by the inhabitants of the village for going to their fields. This was the only short and direct way through which the plaintiff could go to his fields. The defendant enclosed the way by raising certain constructions, as a result of which it was impossible for the plaintiff's bullock carts to pass. The plaintiff brought a suit for demolition of the constructions :

*Held* that the village pathway not being a public pathway S. 91 did not apply: 5 A. I. R. 1918 Cal. 212; 16 A. I. R. 1929 All. 790 and 17 A. I. R. 1930 Cal. 286, *Rel. on*; 24 A. I. R. 1937 Pat. 54, *Disting.* [Para 9]

*Held also* that even if the path be regarded as a public pathway, the plaintiff having succeeded in showing special damage had a cause of action against the defendant. [Para 13]

Civil P. C.—

('44-Com.) S. 91, N. 3, Pt. 10

*Cases referred:-*

1. ('18) 46 I. C. 970:5 A. I. R. 1918 Cal 212, Nagendra Nath v. Banwari Lal.
2. ('29) 16 A. I. R. 1929 All. 790: Sahdeo Singh v. Ram Nawal Singh.
3. ('30) 17 A. I. R. 1930 Cal. 286: 57 Cal. 526: 125 I.C. 600, Pran Nath v. Emperor.
4. ('76) 25 W. R. 233, Sham Soonder v. Nonee Ram Das.
5. ('87) 9 All. 434, Fatehyab v. Mohamnad Yusuf.
6. (1903) 2 Ch. 344:72 L J Ch. 626: 89 L.T. 209, Brocklebank v. Thompson.
7. ('37) 24 A. I. R. 1937 Pat. 54:166 I. C. 538, Bissessar Pathak v. Harbans Lal.
8. ('37) 24 A. I. R. 1937 Pat. 481: 16 Pat. 190: 167 I.C. 798, Ramghulam Khatik v. Ramkhelawan Ram.
9. ('35) 1935 O. W. N. 899: 23 A. I. R. 1936 Oudh 154: 157 I. C. 638, Raghubar v. Madari.
10. ('19) 6 A. I. R. 1919 Cal. 123: 49 I. C. 79, Harihar Das v. Chandra Kumar
11. ('42) 29 A. I. R. 1942 Cal. 360 : I.L.R. (1942) 1 Cal. 533 : 201 I. C. 483, Surendra Kumar v. District Board, Nadia.
12. ('41) 28 A.I.R. 1941 Mad. 176 : I.L.R. (1941) Mad. 367 : 194 I. C. 130 (FB), Venkatanarasimharaju v. S. Ramaswami.
13. ('43) 30 A. I. R. 1943 Mad. 522 : 209 I. C. 202, Subramanyam Chettiar v. Meyyammai Achi.

*P. N. Chaudhari*—for Appellant.
*N. Banerji*—for Respondent.

**Judgment.**— The suit out of which this appeal arises was for recovery of possession by demolition of certain unauthorised constructions made by the defendant. In order to understand the case of the parties a reference to the Commissioner's map, which forms part of the decree of the Courts below, will be necessary. According to the plaintiff there is a village path which had been in the use of the parties for a long time. This path led to the fields from No. 217 in village Nagwa through a corner of ahata Nos. 68 and 70 towards the south and through Nos. 217 and 218 towards the north to No. 126 and to village Sangwa. The defendant by raising certain constructions enclosed the way, at Nos. 68 and 70 and closed the plaintiff's way to his fields on the south. The plaintiff sued for possession by demolition of the constructions. These were walls, house, phulwari and marha etc. The defence was that the way being a public way no suit could be brought without the sanction of the Advocate-General as required by S. 91, Civil P. C. It was also alleged that the constructions complained of were old.

[2] The trial Court framed issues. It held that there was a way on Nos. 217, 218, 68 and 70 in village Nagwa that it was used by the parties and other inhabitants of the village for going to the fields on the south and north of the village, that it was not a public way and that this was the only short and direct way through which the plaintiff could go to his fields on the south of the village. This way had been in existence since 1872. In view of this finding, the trial Court relying upon a case in 46 I. C. 970= A. I. R. 1918 Cal. 212[1] held that there was no encroachment on the right of the public as the inhabitants of Nagwa village alone used the right of way and sanction under S. 91 was not necessary. The unauthorised constructions were held to be not more than three years old and the defendant by putting them up had furnished a cause of action to the plaintiff for seeking the relief of demolition. The suit was accordingly decreed. The lower appellate Court has upheld the decree.

[3] For the appellant - two contentions have been raised before me. Firstly that the path is a public path and S. 91 bars that suit. Secondly

that there was another path in the village available to the plaintiff and unless special damage was proved—which was not done in the present case—the plaintiff had no cause of action In support of the contention both parties have relied upon judicial decisions

[4] In A I R 1918 Cal 212[1] the learned Judges, in answer to the argument that the suit relating to the village pathway is governed by the provisions of S 91 Civil P C, relating to public nuisance observed that a village pathway is obviously not a public nuisance nor are the public at large affected by the obstruction of the pathway which only the inhabitants of the particular village have the right to use

[5] Dalal J in A I R 1929 ALL 790[2] held that S 91 Civil P C, was not applicable to an encroachment on a village road which was used by the residents of the village as means of passage

[6] In A I R 1930 Cal 286[3] Mukerji J held that a pathway, which lies over a private land and which is used by the villagers and perhaps by the inhabitants of some of the villages, but with regard to which there is no testimony of universal user sufficient to raise a presumption of dedication to the public is not a public way within the meaning of S 283 Penal Code In this connection the learned Judge also observed

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fields of a village such ways are not regarded as public ways but private ways and they generally have their origin in custom (1903) 2 Ch 344[6]

[7] Reference has been made on behalf of the appellant to A I R 1937 Pat 54[7] and A I R 1937 Pat 481[8] In the former case an *usara* was built on a village path or a village lane and the plaintiff complained of it as a public

under O 1, R 8 Civil P C, is necessary The case is distinguishable as the plaintiffs in that case made no claim as regards special damage suffered by them In the latter case, it was held that the test is whether the action complained of is a public nuisance or not Where all members of the public have suffered inconvenience or damage an action by an individual will not lie excepting as indicated by S 91 Civil P C, but where the plaintiff who enjoys the use of the well along with others is disturbed by the action of the defendant an action for injunction against that defendant is maintainable at his instance alone without proof of any special damage and it is not necessary for him in such a case to comply with the provision of O 1, R 8, Civil P C

[8] The case in 1935 O W N 899[9] is of little help to the appellants There the defendant had made certain constructions on a public road on which the plaintiffs claimed the right to take their *tazias* in procession It was held that it was a public nuisance and the suit by the plaintiffs was not maintainable without the sanction of the Advocate General if no special damage was alleged or proved

[9] I hold, therefore that the village pathway not being proved to be a public pathway and there being no public nuisance S 91 will not apply

[10] As regards the second contention, it would be sufficient to refer to the concurrent findings of the Courts below that there is no other passage available to the plaintiff for egress and ingress to his house This is a finding of fact based on admissible evidence and must be taken to be conclusive The plea that there was another passage besides the one in suit was not taken in the trial Court and was characterised by the lower appellate Court as an afterthought The Courts below further found that the constructions complained of have blocked the passage and it was impossible for the plaintiff s bullock carts to pass It is obvious therefore, that the plaintiff has succeeded in proving special damage

[11] In A. I R 1919 Cal 123[10] the learned Judges held that the infringement of a right of way over a village pathway, on which the plaintiff with other villagers had got a right from *long user, does not require proof of special* damage to afford a cause of action to the plaintiff They further held that the fact that the plaintiff and his servants were compelled by reason of an obstruction to a public way to go by a longer route and therefore had been put to further and additional expenses, is sufficient special damage entitling the plaintiff to maintain a suit for removal of the obstruction and for declaration of his right of way

[12] In the following cases it was held that a private individual has no right of action in respect of a public nuisance unless he can show that he has sustained special damage over and above that inflicted upon the public at large or the obstruction has the effect of substantially depriving him of the enjoyment of the property (1) A I R 1942 Cal 360[11] (2) A I R 1941 Mad 176[12] and (3) A I R 1943 Mad 522[13]

The learned counsel, however, referred to certain cases and contended that it is the law of limitation applicable to the Court which passed the decree that should be applied. He relied among others on 17 Cal. 491,[1] 24 Cal. 473,[2] A.I.R. 1930 Lah. 143,[3] 36 Mad. 108,[4] 45 Mad. 1014,[5] 15 Pat. 356[6] and 35 Bom. 103.[7]

[7] In the first of these cases, S, a judgment-creditor, who had obtained his decree in the Calcutta Court of Small Causes on 29-7-1884, had it transferred to the High Court for execution, and took certain proceedings there to execute it, which resulted in an order passed on 13-6-1885, for payment out to him of certain monies realised in the proceedings in part satisfaction of his decree. Payment was actually made on 8-8-1885. The next step in execution was an application made on 14-9-1888; the usual notice was issued, and no cause being shown by the judgment-debtor, an order was made on 19th December for the attachment of certain monies in the hands of a Receiver belonging to the judgment debtor. These monies were also attached by other judgment creditors. The question was then referred to the Registrar to inquire and report who, under the provisions of S. 295, Civil P. C. were entitled to share in such monies, and in what proportion. It was objected that S was not entitled to share on the ground that on 14-9-1888 the right to execute his decree was barred by limitation. The question was referred by the Registrar to the Court. It was held that as under Art. 179, Sch. 2 of Act 15 [XV] of 1877, the period applicable to decrees of the Small Cause Court was three, years, the application of 14-9-1888 was barred by limitation, and that S was not entitled to share under the provisions of S. 295. It was observed that having regard to the provisions of Ss. 227 and 228, Civil P. C. (Act 14 [XIV] of 1882) the period of limitation applicable to the execution of a decree, transmitted by one Court to another for execution depends on the character of the Court which passed the decree, and not on the character of the Court executing it.

[8] To apply these observations to the case before us would be to lose sight of the important factor which distinguished that case from the one before us, namely, that the Lucknow Court is executing a decree of a foreign Court and there is a conflict of laws on the question as to the period within which application for execution of decrees can be made in the two Courts. Section 48 of Act 5 [V] of 1908 applies to the Lucknow Court to which the application for execution is made, though there is no such or an analogous provision in the Code of Civil Procedure in force in Jaipur the situs of the Court by which the decree was transferred. In the Calcutta case the Small Cause Court as well as the High Court were governed by Acts passed by the Indian Legislature and though the provisions of law applicable to the Small Cause Court and to the High Court may be different, there was no case of a conflict of laws. The laws governing both the Courts were passed by the Indian Legislature. All that was decided by that case was that the period applicable to the decrees of the Small Cause Court was three years. The fact that the application for rateable distribution was made to the High Court was held to be irrelevant.

[9] Wilson J. who decided that case, pointed out that while the old Procedure Code Act, VIII of 1859, provided that the copy of a decree transmitted to a Court for execution should have *the effect of a decree of that Court*, Ss. 227 and 228 of Act XIV of 1882 laid down only directions as to the manner of execution and did not make the decree one passed by the Court to which it is sent for execution.

[10] The same view was taken in the second case, 24 Cal. 473,[2] by a Full Bench of the same Court.

[11] In the third case it was held by Johnstone J. that a Court executing a transferred decree cannot entertain any objection regarding the legality or propriety of the order directing execution. A statement of the facts on which this decision was given will make it clear that it has no application to the case before us. The appellant in that case obtained a decree in the Amritsar Court and took out execution. Then he got a transfer certificate for part of the decree at Sialkot. The Sialkot Court objected that the transfer certificate was invalid on the ground that it should not have been granted for a part of the decree, and it rejected the application for execution. It was held that the Sialkot Court was not justified in refusing to execute a part of the decree, as directed in the transfer certificate. No question of the applicability of S. 48 arose in that case.

[12] In the fourth case, a decree of the Presidency Small Cause Court (Madras) passed in 1896 was transferred for execution to the City Civil Court. Section 48, Civil C. P. not being applicable to the Court of Small Causes, it was held that an application for the execution presented to the City Civil Court in 1910 was not barred, the Article applicable to the case being Art. 182, Limitation Act and that the fact that S. 48, Civil C. P. was applicable to the City Civil Court, was immaterial. The point which arises before us for consideration did not arise there. The decision is easily understood in view of the provisions of S. 8, Civil C. P. which says "save as provided in Ss. 24, 38 to 41, 75, cls. (a), (b) and (c), 76, 77 and 155 to 158 and by the Presidency.

Small Cause Courts Act, 1882 the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the Towns of Calcutta, Madras and Bomby ' As was held in A I R 1942 Pat 128[8] the words "the provisions in the body of this Code shall not extend to any suit in the above mean that the provisions shall not also extend to any decree passed in any suit in a Presidency Small Cause Court Section 48 Civil P C, therefore cannot apply to a decree passed by a Presidency Small Cause Court and the decree can be executed by any other Court not mentioned in S 8 even after the period of 12 years

[13] In the fifth case an application for transmission of a decree of 1911, passed by the District Court of Mysore to the High Court of Madras on its original side for purposes of execution was filed in the former Court in 1916 and was eventually transferred by the Chief Court of Mysore on 30 1 1919 after contest by the judgment debtor On an application for execution being filed in the Madras High Court on 8 1 1921, the judgment debtor pleaded the bar of limitation The decree holder contended that the application for transmission of the decree from the Mysore Chief Court to the Madras High Court was an application in aid of execution and also relied on the bar of res judicata It was held that the application for transmission of the decree from the Mysore Court to the Madras High Court was an application to take a step in aid of execution of the decree so as to save the bar of limitation for the present application for execution and that the application of 1921 was not barred The main point decided and on which the discussion of the question of limitation turned was whether the application to the District Court of Mysore, dated 9 12 1916 continued by a further application dated 15 3 1918 to transmit the decree to the Madras High Court was or was not a step in aid of execution Both the District Court and the Chief Court of Mysore on appeal held that it was and that execution was not time barred Though Sir Walter Salis Schwabe C. J and Wallace J appear to have differed on the question of res judicata raised in the case, they agreed that the application for transmission of the decree from the Mysore Court to the Madras High Court was an application to take a step in aid of execution of the decree so as to save the bar of limitation It is interesting to note the observations of Wallace J, that the law of limitation applicable to an application for execution filed in a Court in British India is the British Indian law His Lordship further pointed out that the decision of the Mysore Chief Court is not res judicata on the question of the previous application for transmission being a step in aid of execution but under the British Indian law, an application for transmission of the decree from the Mysore District Court to the Madras High Court was an application to take a step in aid of execution This case cannot be of any help to the appellants

[14] In the sixth case two instalment decrees passed by a Santal Court had, after part satisfaction, been transferred to the Munsif s Court at Banka for execution The judgment debtor objected to the execution on the ground that the decrees were barred under Rule 35 of the Judicial Rules framed under S 27 of the Santal Parganas Justice Regulation 1893, and in the other case it was also contended that the decree had become void under the said Rule It was held that the Limitation Act being one of the enactments that was in force in the Santal Parganas Rule 35 of the Judicial Rules laying down that execution shall be taken within one year, was inconsistent with Art 182, Limitation Act, which prescribed three years' limitation for execution of decrees and was *ultra vires* It was further held that in the other case the decree had not become void for R 35 was subject to the proviso contained in R 36 which makes an exception in favour of a pending proceeding That case has no bearing to the facts of the present case.

[15] In the seventh case the facts [illegible] as follows On 17 7 1893, the plaintiff [illegible] tained a decree in the Amreli Court [illegible] territory of H H the Gaekwar of B[illegible] On 12 5 1894, an application for [illegible] was made On 10 7 1905 a second [illegible] tion was made, the prayer being for [illegible] ment of the movable property [illegible] dant 'in whatsoever village [illegible] ever places in the Okhamandal' being within the jurisdiction [illegible] Court, the order for attachment [illegible] On 5 7-1909 the decree [illegible] the plaintiff's application [illegible] High Court for execution [illegible] an application for execution [illegible] property in B[illegible] held by Sir Basil S[illegible] that the application [illegible] tion with regard [illegible] which was [illegible] application and [illegible] after the dat[illegible] provision [illegible] observation [illegible]

' There [illegible] an order for [illegible] sion of a decree [illegible] order [illegible]

tion† or the transmission an application for execution: 16 Cal. 741,[9] 22 Cal. 921.[10] The whole of the argument on behalf of the plaintiff upon this point has been devoted to the attempt to satisfy this Court that the order for transmission is an order for execution."

This contention was negatived. In A. I. R. 1937 Rang. 477,[11] a decree passed by a Court in the Federated Shan States was transmitted to the Court of Small Causes, Rangoon. This decree was about nine years old when the order for transmission was passed. The Court which passed the decree sent to the Court of Small Causes, Rangoon, a copy of the decree, a certificate of non-satisfaction and a certificate to the effect that no order had been passed by it for execution of the decree. The respondent decree-holder applied for execution to the Rangoon Court. Notice was issued to the judgment-debtor who filed an objection that the decree was time-barred. The learned Judge, Small Cause Court, overruled the objection on the ground that where a Court makes an order for execution of a decree and transmits the decree for execution to another Court, the latter Court has no power to determine whether execution is barred by limitation. It was held that the Court to which a decree is transferred for execution has no jurisdiction to decide whether the execution of the decree is barred by law by reason of the invalidity of the order of transmission, although such Court is not only competent but bound to consider whether the application for execution made to itself is in time or not. There are stray observations in the judgment of the two learned Judges constituting the Bench which decided the case that may indirectly lend support to the appellants' contention, but the point of law decided is against them.

[16] In the present case the Lucknow Court "is not only competent but bound to consider whether the application for execution made to itself is in time or not." The appeal must fail because it is obvious that the application for execution to that Court was made more than 12 years after the passing of the decree by the Jaipur Court.

[17] We are clear that the question before us is to be determined on the language of S. 44. Under that section the decree received from the Jaipur Court is to be executed as if it had been passed by a Court in British India. It is obvious in view of S. 48, Civil P. C. that a fresh application for execution of a decree passed by a Court in British India in 1925 cannot be entertained in 1942.

[18] Before bringing this judgment to a close we may mention that the trial Court has relied in support of the view taken by it on 40 Bom. 504.[12] In that case a decree was passed by the Baroda Court in 1909. The first application to execute the decree was made in 1913, it being within the time prescribed by the law in Baroda. The decree was transferred to the Ahmedabad Court (British) for execution in 1915, where the judgment-debtor contended that no application to execute the decree having been made within three years of its date, the execution of the decree was barred. It was held that the decree was incapable of execution in the Ahmedabad Court having been barred according to the British Law of Limitation which governed the case. It is unnecessary for the purposes of the present suit to go so far. The exact question which arose in that case does not arise before us. It is sufficient for the purposes of the present case to hold that the law applicable to the facts on which the question of law came to be determined is the British Indian law and that no question of *res judicata* arose because the matter for consideration by the Oudh Court was never determined by the Jaipur Court.

[19] Having given the matter our careful consideration we are of opinion that the view of law taken by the trial Court was correct. The appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

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## A. I. R. (34) 1947 Oudh 210 *[C. N. 72.]*

MISRA AND KAUL JJ.

*Maqbool Husain—Plaintiff—Appellant* v. *Govt. of U. P.—Defendant—Respondent.*

First Civil Appeal No. 72 of 1943, Decided on 27-3-1947, against decree of Civil Judge, Hardoi, D/-29-3-1943.

(a) Police Act (1861), S. 7, as amended in 1937 —Order of dismissal of Sub-Inspector passed by Inspector-General of Police—Validity of—Government of India Act (1935), Ss. 240 (2), 241 (1) (b) and 321 (b)—Government of India (Adaptation of Indian Laws Order), 1937, Para 10.

A Police Sub-Inspector who was appointed in 1931 in the U. P. Police Force was dismissed from service by the Inspector-General of Police in 1939 under S. 7, Police Act. The Sub-Inspector brought a suit for declaration that his dismissal by the Inspector General of Police was invalid and that he still continued to be in service and for damages for wrongful dismissal. It was contended by him that in the absence of any direction having been given by the Governor for appointment of Sub-Inspectors by any authority other than himself he must be deemed to have been appointed by the Governor under S. 241 (1) (b) read with S. 321 (b), Constitution Act and therefore was not liable to dismissal by any authority subordinate to the Governor by virtue of S. 240 (2) of that Act:

*Held* that the contention could not be accepted. At the time of the commencement of the Constitution Act of 1935, the highest authority who was empowered to appoint and dismiss Sub-Inspectors of Police was the Inspector-General of Police under S. 7, Police Act. By virtue of para. 10 of the Adaptation of Indian Laws Order, 1937, this power continued to remain vested in him till it was conferred on the Deputy Inspector General of Police under the Police Regulations. The

omission of any reference in the amended S. 7, Police Act, to power of appointment of Sub Inspector could not affect the position. Consequently the order of dismissal of the plaintiff by the Inspector-General of Police was perfectly valid and good. 32 A. I. R. 1945 F. C. 47, *Rel. on.* [Paras 9 and 11]

(b) Evidence Act (1872), S. 78 (1)— Public document—U. P. Police Gazette.

The U. P. Police Gazette which is marked 'Published by authority' and which bears the seal of the Provincial Government is a public document and Courts can take judicial notice of it even though it is not formally produced in evidence. An order of appointment of a Police Sub Inspector made by the Police Department in U. P. can, therefore, be proved by such Gazette notification. [Para 15]

(c) Criminal P. C. (1898), S. 197—Sub-Inspector of Police removable from service without sanction of Provincial Government—Sanction to prosecute not necessary.

Section 197 requires the sanction of the Governor or some higher authority only in the case of public servants who are not removable from office save by or with the sanction of the Provincial Government or some higher authority. A Sub Inspector of Police who could be removed from service by the Inspector General of Police without the sanction of the Provincial Government, under S. 7, Police Act, 1861 cannot therefore, avail himself of the protection referred to in S. 197. [Para 16]

('46-Com.) Cr. P. C. S. 197 N. 4 Pts. 1 and 15

(d) Criminal P. C. (1898), S. 561A—Nature of jurisdiction under section— Finding on application under section not to be challenged in civil Court.

Where an accused appl... under S. 561A for ...

... referred to in S. 197 does not relate to this jurisdiction and cannot affect its exercise. [Para 17]

('46 Com.) Cr. P. C., S. 561A, N. 1

(e) Government of India Act (1935), S. 240 (1)—Police Officer—Dismissal from service—Suit against Crown—Maintainability.

A Sub Inspector of Police was dismissed from service upon his conviction for offences under Ss. 161 and 218, Penal Code by the Inspector General of Police, who was the proper authority to pass the order. According to the Police Regulations a dismissal was to follow necessarily upon a sentence of rigorous imprisonment and the Police Department had no power to re examine the truth of the facts in issue at the judicial trial.

*Held* that His Majesty's pleasure in behalf of the termination of tenure of service having been declared by proper authority, the Sub Inspector had no right of action against the Crown. 24 A. I. R. 1937 P. C. 27 and 24 A. I. R. 1937 P. C. 31, *Rel. on.* [Para 18]

*Cases referred:—*

1. ('45) 32 A. I. R. 1945 F. C. 47 : 1945 F. C. R. 103, I. L. R. (1945) Kar F. C. 101 (F. C.), Secy. of State v. I. M. Lall.

2. ('37) 64 I. A. 55 : 24 A. I. R. 1937 P. C. 31 : I. L. R. (1937) Mad. 532 : 166 I. C. 516 (P. C.), Venkata Rao v. Secy. of State.

3. ('37) 64 I. A. 40 : 24 A. I. R. 1937 P. C. 27 : I. L. R. (1937) Mad. 517 : 166 I. C. 513 (P. C.)

*Faiyaz Ali and Dr. Qu'buddin Ahmed*—for Appellant

*Government Advocate*—for Respondent

**Judgment.**—This is a plaintiff's appeal in a suit for a declaration and for recovery of ... follows. The ... cruited in the ... October 1931, as a Sub Inspector. In 1938 he was charged with offences under Ss. 161 and 218, Penal Code, and committed to Sessions for trial. He was convicted under both these sections on 3-11-1939 and sentenced to one year's rigorous imprisonment and Rs. 200 fine under each count. Consequent on his conviction the Superintendent of Police, Hardoi, passed on 16-11-1939 an order of dismissal of the appellant to take effect from 3-11-1939 (the date of his conviction) which was submitted to the Deputy Inspector General of Police for sanction. This order purported to be passed under regulations 451 and 462 (a) of the Police Regulations. Maqbool Husain preferred an appeal against the order of his conviction to this Court which was dismissed. Accordingly on 24-4-1940, the order of dismissal passed by the Superintendent of Police, Hardoi, on 16-11-1939, was confirmed by the Deputy Inspector-General, U. P., Second Range. It may be mentioned that after he was committed to the Court of Session, the appellant was placed under suspension from service with effect from 19-7-1938. During the period of his suspension he was allowed to draw a subsistence allowance equal to a quarter of his pay.

[2] After the dismissal of his appeal by this Court Maqbool Husain made an application under S. 561A, Criminal P. C., to this Court whereby he contended that as no sanction of the local Government for his prosecution as required by S. 197, Criminal P. C., was obtained his conviction was without jurisdiction and of no legal effect. This contention was repelled and it was held that S. 197 had no application to the facts of the appellant's case. On 24-10-1942 Maqbool Husain filed the suit out of which this appeal arises against the Government of the United Provinces, and prayed for the following reliefs:

"(a) It be declared that the plaintiff appointed as a ...

... dant be passed.

(a) on account of pay Rs. 3000.
(b) on account of damages Rs. 2100."

[3] It appears that some doubt as to the regularity of the order of the appellant's dismissal by the Deputy Inspector General was entertained and accordingly on 2.5 1942, the Inspector-General of Police, U. P. passed an order of dismissal of Maqbool Husain. This order was to take effect from the date of his conviction by the Sessions Judge, 3-11-1939.

[4] It was contended on behalf of the Government of the United Provinces that no sanction of the Provincial Government for the appellant's prosecution under s. 197, Criminal P. C. was necessary and that his conviction by the Sessions Judge, which was confirmed by the Chief Court was perfectly valid and legal. The appellant's contention that he was appointed by the Governor, was traversed and it was contended that his dismissal by the Inspector-General of Police was in no way against the provisions of the Government of India Act. It was further pleaded that this was not a fit case in which this Court should grant the declaration asked for.

[5] It was found by the learned trial Judge that the plaintiff was appointed by the Inspector-General of Police and not by the Governor, as was contended on his behalf. He further held that in view of the above finding s. 197, Criminal P. C. could not apply to his case, and though the original orders of his dismissal passed by the Superintendent of Police, Hardoi, and by the Deputy Inspector-General of Police, Second Range, which were not communicated to the plaintiff were of no effect, the order of the appellant's dismissal by the Inspector-General of Police passed on 2-5-1942, which was to take effect from the date of the plaintiff's conviction, was perfectly valid. The learned Judge further opined that if the plaintiff's order of dismissal by the Inspector-General of Police were held to be invalid the plaintiff would be entitled to the declaration claimed, but in view of the finding arrived at by him as regards the validity of the order passed by the Inspector-General of Police, no declaration could be granted. It was held further that the plaintiff was not entitled to any damages. In view, however, of the fact that the plaintiff had received the suspension allowance granted to him only up to 31-10-1939, and the Inspector-General's order of dismissal was to take effect from 3-11-1939, the learned trial Judge held the appellant entitled to Rs. 1-3-0 as due on account of subsistence allowance for 1st and 2nd November 1939. The plaintiff was accordingly granted a decree for Rs. 1-3-0. As regards costs it was ordered that the parties should receive and pay costs in proportion to their success and failure.

[6] The appellant's chief contentions in appeal before us were: (1) That he was appointed by the Governor and was not liable to be dismissed by any authority subordinate to the Governor; the order of the Inspector-General of Police dismissing him from service was accordingly illegal in view of the provisions of s. 240 (2), Government of India Act, and (2) that under s. 197, Criminal P. C. he could not be prosecuted for any of the offences with which he was charged without the previous sanction of the Provincial Government, and inasmuch as no such sanction was obtained the Sessions Judge had no juridiction to try and convict him. His conviction must accordingly be held to be of no effect and it could not affect his status as a Sub-Inspector of Police in the U. P. Police Force. We will deal with these points in order.

[7] No evidence was adduced to show that the appellant was appointed a Sub-Inspector by the Governor of the United Provinces. Reliance was, however, placed on his behalf on the provisions of s. 241, Government of India Act, sub-s. (1) (b) which runs as follows:

"Except as expressly provided by this Act, appointments to the Civil Service of and Civil posts under the Crown in India, shall, after the commencement of part III of this Act be made. (b) in the case of services of a Province and posts in connection with the affairs of a Province, by Governoror such person as he may direct."

It was contended that though the appellant was unable to produce any order of his appointment passed by the Governor of the United Provinces, it must, in view of the provisions of the Constitution Act referred to above, be taken that he was appointed by the Governor or such person as the Governor may direct. That there was no evidence to show that the Governor had directed any person to appoint Sub-Inspectors in the U. P. Police Force. Accordingly his appointment should, for the purposes of the present case be deemed to have been made by the Governor. The appellant was recruited to the U. P. Police Force before the date on which the present Constitution Act came into force. Accordingly to meet any objection on that score his learned counsel relied on s. 321 (b), Government of India Act.. It was contended that the appellant's appointment which was made under the Government of India Act of 1919, must by virtue of the provisions of s. 321 (b) have effect as if it were an appointment to the corresponding office under this Act.

[8] Reference was also made to the case in A.I.R. 1945 F.C. 47.[1] That was a case of one Mr. Lal who was a member of the Indian Civil Service. He was removed from the Indian Civil Service with effect from 4 6-1940 by His Majesty's Secretary of State for India. The following extract from the report of the case will show Mr. Lall's conten-

tion and the decision of their Lordships of the Federal Court thereon:

"Mr Lall endeavoured to put before us a detailed historical account indicating that from at least the year 1833 onwards there was always an express statutory provision prescribing the authority and manner in which an officer of the East India Company and sub-

him were by virtue of S. 2, Constitution Act, 1935 vested in His Majesty, and that as under the Constitution Act, there was no express delegation of such power to the Secretary of State and no *express directions by His Majesty under sub s (1)* of S 2 as to the manner in which those powers were to

S 240 provides that no person who is a member of the Civil Service of the Crown in India shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed. There would here seem to be a clear implication that the authority who has been given the statutory power of appointment has the power to dismiss This result can also be obtained from the implication which would arise from the general common law rule that a power to appoint carries with it, in the absence of any other provi-

from the Indian Civil Service."

[9] Reasoning similar to that of Mr. Lall as noticed above was adopted by the learned counsel for the appellant He contended that as a result of S 321 (b) of the Constitution Act read with S 241 (b) he should be deemed to have been appointed a Sub-Inspector in the United Provinces Police Force "by the Governor or such person as he may direct" As there was no proof of any direction having been given by the Governor for appointment of Sub Inspectors by any authority other than himself, it should be taken that his appointment was made by the Governor and consequently he could not be dismissed by any authority subordinate to the Governor (S. 240 (2)). We are clearly of opinion that the adoption of this line of reasoning cannot be helpful to the appellant.

[10] The United Provinces Police Force, whereof the appellant was a member was constituted under the Police Act, 5 [V] of 1861 Under S 7 of that Act as it stood prior to its amendment by *the Adaptation of Indian Laws Order, 1937, power* to appoint and dismiss Sub-Inspectors rested under such rules as the local Government sanctioned from time to time with the Inspector-General, Deputy Inspectors General, Assistant Inspector *General and District Superintendents of Police.* It is clear, therefore, that under the Act by which the police force in the United Provinces was constituted the highest authority that could appoint the present appellant a Sub Inspector could be the Inspector General of Police. With the passing of the Government of India Act of 1935 power was conferred upon His Majesty in Council by S 293 of the Act to provide that any law in force in British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the Act. It was provided by para. 3 of the Adaptation of Indian Laws Order, 1937, that the Indian laws mentioned in Schedules to that Order shall, until repealed or amended by a competent Legislature or other competent authority have effect subject to the adaptations and modifications directed by those Shedules to be made therein or if so directed shall cease to have effect. By Sch I of the said Order-in Council certain amendments were made in various sections of the Police Act and S. 7 of the Act after the amendment reads as follows.

"Subject to such rules as the Provincial Government may from time to time make under this Act the Inspector General, Deputy Inspectors General, Assistant Inspectors General and District Superintendents of

It will thus be seen that this section 7 of the Police Act, which continued to be in force even after the new Constitution Act gives the Inspector-C

under S. 240, Constitution Act no person holding a civil post under the C in India

can be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed. The main object of the Adaptation of Indian Laws Order was as expressly stated in S. 293, Constitution Act, to bring the provisions of the Indian Acts into accord with the provisions of that Act. It must, therefore, necessarily follow that when power to dismiss Sub-Inspectors was secured by the Police Act to the Inspector General of Police, there could be nothing in the Constitution Act to conflict with this provision.

[11] It cannot be contended that such a conflict would arise if the Governor did not direct the Inspector General of Police to appoint Sub-Inspectors. An answer to such an objection will be found in para. 10 of the Order-in-Council to which reference is made (Adaptation of Indian Laws Order 1937). It is laid down by this paragraph that save as provided by that Order all powers which under any law in force in British India, or in any part of British India were immediately before the commencement of the Government of India Act of 1935 vested in or exercisable by, any person or authority shall continue to be so vested or exercisable until other provision is made by some legislature or authority empowered to regulate the matter in question. At the time of the commencement of the new Constitution Act the highest authority in whom power to appoint Sub-Inspectors in the United Provinces Police Force could be vested was the Inspector General. (It is now vested in the Deputy Inspectors General, see Police Regulations.) It was not contended that apart from what was said in S. 241 (1) (b), Government of India Act, 1935, this power was taken away from the Inspector General. But we have seen that by virtue of para. 10 of the Order-in-Council this power continued to remain vested in the Inspector General till it was conferred upon the Deputy Inspectors General and thus the passing of an order of dismissal of the appellant by that authority was perfectly good and valid.

[12] We may mention that the reason for the omission of any reference in the amended S. 7, Police Act to power of appointment of Sub-Inspectors is obvious. The authority to confer the same power "upon such person as he may direct" being given to the Governor it was unnecessary to provide for the same in the Police Act, though it may be observed that by retaining the power of dismissal of Sub-Inspectors in the Inspector General, Deputy Inspectors General, Assistant Inspectors General and Superintendents of Police, as the rule sanctioned by the Provincial Government may provide the position remains practically the same. Obviously the highest authority whom the Governor can, if a conflict between S. 7, Police Act and S. 240 (2) is to be avoided, direct to appoint Sub-Inspectors is the Inspector General. But so far as the case of the present appellant was concerned the Inspector General had under S. 7, Police Act as it stood before its amendment by the Order in Council the power of appointment. This continued to rest in him so long as it was not conferred upon the Deputy Inspectors General under the new Police Regulations. The appellant's contention that there is no proof that the Governor has directed any person to appoint SubIinspectors cannot advance his case.

[13] Thus the argument of the learned counsel for the appellant that there was nothing to show that the Governor of the United Provinces had under S. 241 (b), Constitution Act directed any person to appoint Sub-Inspectors is fully met. His contention that his dismissal by the Inspector General of Police was illegal must, on the line of reasoning adopted by his counsel, be rejected.

[14] We find, however, that there is ample evidence to show that the appellant was appointed a Sub-Inspector by the Inspector General of Police. The appellant was appointed a Sub-Inspector before the present Constitution Act came into force. Paragraph 881 of the Police Regulations then in force reads as follows:

> "For the rules as to the appointment of sub-inspectors of the civil police, see the U. P. Police Training College Manual part II."

We were furnished with a copy of this Manual by the learned Government Advocate. It contains rules for appointment and training of subordinate officers and management of the school. The procedure relating to "Directly appointed candidates for Sub-Inspectorship" is briefly as follows:

Every Commissioner calls on the Magistrate of each district of his division to forward a list of candidates nominated by him and by the Superintendent of Police for admission to the coming session of the Police Training School. When the nominations are received from Magistrates, the Commissioner prepares a divisional list to which he may add any candidate resident in his division nominated by himself or by a *Deputy Inspector General*. The *Commissioner* summons a committee to meet at the headquarters of the division in October or between March 15 and April 15 to inspect the candidates whose names are on the list. This committee consists of the Commissioner, the District Magistrate and Superintendent of Police at the headquarters of the Division and the Deputy Inspector General of the range. The Commissioner sends a notification of the date, place and time of the

ting for publication in the Police Gazette informs each candidate of it by letter. The mmittee selects the candidates and the Com ssioner then sends the rolls of the selected ndidates to the Inspector General of Police who, there is no reason to the contrary directs that ey be admitted to the school at the next session hese candidates receive their training at the olice Training College and have to pass a final xamination

Rule 44, Police Training School Rules reads thus

'Candidates for the post of Sub Inspector will be placed in a list in accordance with the number of marks obtained at the final examinations Directly appointed candidates who have passed the examination will be posted to selected centres where they will be supernu- merary to the establishment After further training they will be drafted to districts to fill vacancies . All passed candidates will be appointed as sub-inspectors on Rs 70/ on being posted to districts and will remain on probation for two years from the date of their appoint ment after which if they give satisfaction they will be confirmed"

[15] It is admitted on both sides that the appellant was duly nominated and after being declared successful at the final examination appointed a Sub Inspector His appointment and posting to the district to which he was allocated was published in the Police Gazette, U P dated 14 10 1931 We give below the notification rela t[illegible] to his appointment

[illegible] tor General of Police United [illegible] 931 Appoint

of [illegible] tion of the notification [illegible] of the Police [illegible] published at pages 439-440 of the Police [illegible] the 15th idem the following passed candidates of 1930 31 session of the Provincial Police Training School are appointed probationary sub inspectors from the dates on which they join their appointments subject to the pro duction of health certificates (vide circular memo randum No 8/I (a) 652 1912, dated 27-6 1913) They are posted to the districts noted against their names for a course of further training in accordance with R 44, P 224 of the phamphlet entitled 'Rules for the Provincial Police Training School Part II (revised edition 1929)"

Then follows a list of 99 candidates The appel lant's name appears at Serial No 74 He was posted to Shahjahnpur district It was strenuous ly argued by the learned counsel for the appel lant that this document was not formally pro- duced in evidence in the lower Court and could not be looked into by this Court We are clear that the contention is without force Under the Evidence Act, S 78 (1) Acts, orders or notifications of the Central Government in any of its departments, or of the Crown Representa tive, or of any Provincial Government or any Department of any Provincial Government are public documents and they may be proved by the records of the departments certified by the heads of those departments respectively, or by any document purporting to be printed by order of any such Government or as the case may be of the Crown Representative The Gazette before us bears the usual seal and is marked "published by authority." It is headed Police Gazette (For Departmental use only) The order of the appellant's appointment was an order of a Department of the Provincial Government, that is the Police Department, and it could be proved by any document purporting to be printed by order of any such Government There can be no doubt that the Police Gazette which is marked "Published by Authority" and bears the provin cial seal was published by the authority of the U P Government We can accordingly take judicial notice of this publication On a careful examination of the material before us we hold that the appellant failed to establish that he was appointed a Sub Inspector by the Governor or that he can be deemed to have been appointed as such by the Governor of the United Provinces On the other hand we are clear that he was appointed by an order of the Inspector General of Police United Provinces who had authority under S 7, Police Act to make such appoint- ments

[16] His second contention was that inasmuch as no sanction of the Provincial Government for his prosecution as required by S 197, Crimi nal P C was obtained, the Sessions Judge had no jurisdiction to try and convict him His con- viction, accordingly, it was argued, must be held to be of no effect and it could not affect his status of Sub Inspector of the U P Police Force We are clear that the contention is without sub- stance Section 197, Criminal P C, requires the sanction of the Governor or some higher authority only in the case of public servants who are not removable from office save by or with the sanction of the Provincial Government or some higher authority In view of the finding arrived at by us on the first point raised it is clear that the appellant could be removed from service by the Inspector General of Police without the sanction of the Provincial Government. This was so under S 7, Police Act, both as it stood before its amendment by the A[illegible] of Indian Laws Order 1937, and also as it now stands after the amendment. The appellant therefore, cannot avail [illegible] of the [illegible] referred to in S 197, C[illegible] P. C

[17] Apart from the [illegible] at [illegible] have arrived [illegible] Criminal P C, [illegible] applicability of S [illegible], Criminal P C, [illegible] appellant's [illegible] is a bar [illegible] entertained [illegible] Court [illegible] Judge [illegible]

under S. 561A, Criminal P. C. to this Court. It was contended on his behalf that the sanction of the Provincial Government was necessary for his prosecution both under the Government of India Act, 1935 and under S. 197, Criminal P. C. and as no such sanction was granted by the Provincial Government his trial and the proceedings thereunder were absolutely void and illegal. It was prayed that this Court should quash the proceedings taken against Maqbool Husain. These contentions were examined in detail by a Bench of this Court consisting of Sir George Thomas C. J. and Ziaul Hasan J. The Bench repelled both the contentions raised on behalf of the present appellant and the application was dismissed. It was held that no sanction either under the Government of India Act, 1935 or under S. 197, Criminal P. C. was necessary. It was contended by the learned Government Advocate representing the respondent that in view of this finding it was no longer open to a civil Court to go behind it. He pointed out that in certain circumstances a civil Court before which it is urged that a criminal Court which convicted a person had no jurisdiction to do so, might in a proper case inquire into the matter and consider whether the Court which recorded the conviction did or did not possess the jurisdiction to try the party concerned. This, it was argued, would be open to the civil Court if it was necessary for it to arrive at a decision on that point in order to give relief to such a party because if the criminal Court had no jurisdiction to try the person concerned its order recording the conviction is of no effect in the eye of law. This argument might apply to the order passed by the Sessions Judge convicting the appellant and to the judgment of this Court on appeal from that decision. The learned Government Advocate contended that such an argument could not, however, apply when a finding was given by this Court on an application made under S. 561A, Criminal P. C. Section 197, Criminal P. C., bars the jurisdiction of a criminal Court to try certain persons unless sanction of the Provincial Government to such prosecution is obtained. The bar relates to a jurisdiction conferred upon the Court by the Code of Criminal Procedure. The jurisdiction which this Court exercises in hearing and determining an application made to it under S.561A, Criminal P. C. is derived by it not from any provision of the Code but was inherent in it by virtue of its constitution as the highest Court of criminal and civil jurisdiction in Oudh under S. 9, Oudh Courts Act. The bar referred to in S. 197 does not relate to this jurisdiction and cannot affect its exercise. It will be noted that S. 197 bars the jurisdiction of the criminal Court to take cognizance of an offence in certain circumstances. It does not touch the exercise of its inherent jurisdiction by the High Court. We are clear that this contention is well founded and are of opinion that the finding given by this Court on a question of law in deciding the present appellant's application made under S. 561A, Criminal P. C., cannot be challenged in a civil Court.

[18] Another argument put forward by the learned Crown counsel was that even if it be assumed that the appellant's conviction was bad for want of jurisdiction in the Sessions Judge who tried him because no sanction of the Provincial Government was obtained for his prosecution the appellant had no cause of action and could not maintain the present suit. Reliance in support of this contention was placed on 64 I. A. 55[2] and on *R. T. Rangachari* v. *Secretary of State*[3] which is reported in the same volume, at p. 40. It was held in those cases that servants of the Crown hold office during his Majesty's pleasure. This was so under S. 96B, Government of India Act, 1915-16 as amended by the Act of 1919 which was in force at the time of the appellant's appointment as also under the present Constitution Act, S. 240 (1). In both the cases above referred to servants of the Crown were dismissed by proper authority though in disregard of the rules framed under the Act by the Secretary of State for India under S. 96B. It was held by their Lordships that the servants of the Crown had no right of action to seek redress in the civil Court in such cases. The observations of their Lordships on this point may be reproduced here with advantage:

"Section 96B and the rules make careful provision for redress of grievances by administrative process, and it is to be observed that sub-s. (5) in conclusion reaffirms the supreme authority of the Secretary of State in Council over the civil service. These considerations have irresistibly led their Lordships to the conclusion that no such right of action as is contended for by the appellant exists. It is said that this is to treat the words 'subject to the rules' appearing in the section as superfluous and ineffective. Their Lordships cannot accept this view and have already referred to this matter in their judgment in *Rangachari's case*.[3] They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. It is obvious, therefore, that supreme care should be taken that this assurance should be carried out in the letter and in the spirit and the very fact that Government in the end is the supreme determining body makes it the more important both that the rules should be strictly adhered to and that the rights of appeal should be real rights involving consideration by another authority prepared to admit error, if error there be and to make proper redress if wrong has been done. Their Lordships cannot and do not doubt that these considerations are and will be ever borne in mind by the governments concerned and the fact that there happen to have arisen for their Lordships' considera-

tion two cases where there has been a serious and complete failure to adhere to important and indeed fundamental rules, does not alter this opinion In these individual cases mistakes of a serious kind have been

able from the Courts by action To give redress is the responsibility and their Lordships can only trust will be the pleasure of the executive government "

The present appellant stands in exactly the same position as did the appellants in the two cases which went up before their Lordships' Board for consideration though in the present case we have no reason to hold that there has been any disregard of the rules framed under the Police Act which conferred upon the Inspector General the authority to appoint Sub Inspectors A reference to paras 447, 448, 449, 451 and 462 of the Regulations which were in force at the time of the appellant's appointment and dismissal makes it clear that the dismissal of a police officer of the appellant's rank must necessarily follow a sentence of rigorous imprisonment and that it was not open to the authorities in the Police Department "to re-examine the truth of any facts in issue at his "judicial

: facts

low in

held

that the Inspector-General was the proper authority to pass an order for the appellant's dismissal He did so as was enjoined by the Police Regulations It follows, therefore, that His Majesty's pleasure in behalf of the termination of tenure of service having been declared by proper authority he has no right of action in a civil Court.

[19] Yet another contention put forward by the Crown counsel was that the grant of a declaratory relief was discretionary with the Court and this is not a case in which the discretion should be exercised in the appellant's favour. We have held that the plea based on the provisions of S 197, Criminal P. C could not be availed of by the appellant. We have further held that it was not open to a civil Court to consider this question after the finding arrived at by this Court in deciding the application made by the appellant under S. 561A, Criminal P C The appellant having been convicted for offences under Ss 161 and 218, Penal Code is not entitled to the declaration claimed Even if the plea based on S 197 were open to him, and it could be held that the previous sanction of the local Government was necessary to invest the Sessions Judge with jurisdiction to try the appellant, having regard to the circumstances of the case we are of opinion that this is not a case in which the discretion of the Court should be exercised in favour of the appellant

[20] Having given the arguments of the learned counsel for the appellant our careful consideration we are satisfied that they are without substance We dismiss the appeal with costs

K S. *Appeal dismissed*

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## A. I. R. (34) 1947 Oudh 217 [*C N 73.*]

### MADELEY J

*Mt Hajra Begam—Decree holder Appellant* v *Thawwar Ali Khan and another—Judgment debtors—Respondents*

Ex of Decree Appeal No 23 of 1943 Decided on 13 2-1947, *from order of Civil Judge, Lucknow D/ 23 11 1942*

**Civil P C (1908), S 38—Personal decree for costs against legal representative—Execution**

Ordinarily speaking the execution Court has no power to go behind the decree but the Court can do so where a personal decree has been passed against a legal representative of a deceased debtor in respect of the debt due from the deceased This exception does not extend to a decree for costs passed against the legal representative personally A Court of law is at liberty to pass a per

[Para 8]

('44 Com) C. P C S 38 N 8

234 80 I

Singh v

*P. N Asthana*—for Appellant
*Bhawani Shanker*—for Respondents

**Judgment** —This second appeal against an order under S 47, Civil P. C raises the question of the interpretation of a decree passed against the legal representatives of the deceased husband of the plaintiff In the plaint the widow sought a decree against the assets of the deceased for Rs 500 and for costs against the defendants The drafting of the plaint makes it clear that a personal decree was sought against the defendants in respect of costs

[2] The operative part of the learned Munsif's judgment is "The suit is decreed with costs in favour of the plaintiff for Rs 500 against the assets of Nawab Ali Khan deceased " The learned Munsif interpreted his own order as meaning that the decree for costs was not against the assets of the deceased in the hands of the defendants, but against the defendants personally.

[3] In the decree framed by the trial Court the claim is not correctly stated

' That a decree for Rs 500 as a dower with costs against the assets of Nawab

was to the details of the tax, or in other words to matters arising under a lawful tax, the authority of the civil Courts would, having regard to the particular provision of the Punjab Municipal Act, be barred. This provision corresponds to S. 164, U. P. Municipalities Act, as is made clear in the judgment itself. The principle enunciated in the Lahore case has not been challenged. In fact the respondent's learned counsel himself relied upon this authority.

[6] The same view was taken in 57 ALL. 916[3] by a Bench of the Allahabad High Court in which it was held that although the octroi duty which had been levied by the Municipal employees in respect of the particular article should not have been levied, the learned Judges held that the suit did not lie in the civil Court for a refund of the amount.

[7] In the present case the learned counsel for the respondent sought to differentiate this Allahabad decision on the ground that the terminal tax should not be treated as a one whole, but it should be treated as a separate tax in respect of each item of the schedule and that it should be held that there was no tax upon beer, foreign spirits and wines; that therefore, the levying of it by the employees of the Municipal Board was illegal and, since the Municipal Board had derived the benefit, it should be directed to refund the amount realised. It is to be noted that the Municipal employees, who are alleged to have realised the taxes are no parties and the complaint is made of an illegal imposition by the Municipal Board itself. I cannot read the words "terminal tax" as referring to tax on each particular item of goods in the schedule issued by the Municipal Board. Terminal tax like octroi is the name given to one particular tax levied for the benefit of the Municipality. As to what items are covered by it and what are not, are matters of detail but the tax is one whole in the same way as the octroi is one tax or the house tax is one tax. In the Allahabad case it was a case of octroi having been wrongly levied in respect of certain items. In the present case it is a case of terminal tax having been levied in respect of certain items. There is absolutely no difference in the principle between the two cases. If the argument of the learned counsel for the respondent were accepted, it would mean that at every stage there would be a civil suit in order to determine whether a particular item came within the exemption contained in the notification relating to terminal tax or not. Similarly suits could be brought to show that a particular house, for instance, was exempt from house tax as being of a rental value less than that upon which tax is leviable under the rules of the Municipal Board. It was expressly to avoid such litigation that the matter was left to be disposed of by the District Magistrate under Ss. 160 to 164.

[8] There can be no doubt that when the tax was levied in this case, it was open to the aggrieved party to follow the procedure laid down in the rules for the assessment and collection of terminal taxes in the Lucknow Municipality or they could have appealed to the District Magistrate under S. 160: *vide* 57 ALL. 655.[4] The remedy was, therefore, open to them and they did not choose to avail themselves of it.

[9] Reliance was placed by the learned counsel for the respondent on two Bench cases of the Allahabad High Court, viz. I. L. R. (1940) ALL. 383=A. I. R. 1940 ALL. 346[5] and I.L.R. (1939) ALL 345=A. I. R. 1939 ALL. 394.[6] Both these decisions are decisions of a Bench composed of Thom C. J. and Ganga Nath J. In those cases the Bench concerned held that the civil Court had jurisdiction. In the first case it was found that the tax was imposed without jurisdiction inasmuch as it was imposed in respect of a vehicle which neither plied for hire within the limits of the Municipal Board, nor was kept within those limits. Section 128 (1) (iv), Municipalities Act, extends the jurisdiction of Municipalities to impose a tax upon vehicles which are kept within municipal limits or which should ply for hire within municipal limits. In the case before the Bench those conditions were found not to exist. The imposition of tax was, therefore, wholly beyond jurisdiction and *ultra vires*, and the illegal action of the Municipal Board could be challenged in the civil Courts.

[10] In the second case it was held that the Municipal Board had not complied with the procedure laid down by law for the assessment of the tax. In fact the authorities had passed no order under S. 143 (3), Municipalities Act. The assessee had, therefore, been deprived of the right of appeal given to him by S. 160, U. P. Municipalities Act, and no other remedy was open to him, because in the case of house property, S. 160 only permits an appeal from an order under S. 143 (3) or S. 147 (3). In that case, therefore, there was a defect of procedure inasmuch as the provision of the Act had not been complied with. The case, therefore, clearly came within the exception laid down by their Lordships of the Privy Council in 67 I. A. 222[1] which has been quoted above. Neither of these cases, therefore, helps the respondent. All that they lay down is that when the action of the municipal authorities is either *ultra vires* or does not comply with the provisions of the Act conferring authority, it is of no effect and can be challenged in the civil Court. The result, therefore, on a consideration of the provisions of the U. P. Municipalities Act is that the Munici-

...al Board of Lucknow had authority under S 128 (1) (xiii) to impose a terminal tax, that it had ... tax by means of a notification, ... and

...

the payment of the tax ...

... the District Magistrate In these ... pleas

...

has been made the ... its to grant the reliefs prayed for is barred, it not being a question of the validity of the tax itself but only of its applicability to a particular kind of articles

[11] I have already held that as a matter of fact the articles taxed, viz beer, foreign spirits and wines, were exempt from taxation and it was a wrong act on the part of the Municipal ... employees to levy the tax but since the ... of can be ... r, affect the question of ... ow this appeal, set aside the decisions of the Courts below and dismiss the suit, but in the circumstances of the case each party will bear his own costs throughout

N S D *Appeal allowed*

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## A. I. R (34) 1947 Oudh 221 *[C N 75.]*

KAUL J

*Mani Ram and others — Accused — Applicants* v *Emperor.*

Criminal Misc Appln No 167 of 1946 (filed in Cri Revn No 127 of 1946), Decided on 14 3 1947

**(a) Criminal P C (1898) Ss 369 and 561A—High Court's order setting aside conviction in revision or appeal if judgment within S 369—Order if can be altered or reviewed by High Court under S 561 A**

An order of the High Court setting aside the conviction of a person in appeal or revision is a judgment within S 369 The High Court has no power to alter or review it in view of the provisions of S 369 except to correct a clerical error Nor can S 561A be invoked for reviewing or altering it

Section 561A does not confer on the Court any new powers. It only provides that the powers which the Court already inherently possesses shall be preserved ... inserted lest it should be considered that the ... those expressly ... erent power had

Where the Code deals with ... ject specifically in any provisions, any other part of the Code which may appear to be in conflict with them cannot be allowed to ... ...datory unless it is impossible ...

or review it ...

462 and 22 A I R 1935 All 466, *Rel on*, 14 A ... 1927 Lab 139 and 15 A I R 1928 Oudh 402, *Dissent* [Paras 4, 5]

(46 Com) Cr P C S 369 N 2 N 3 N 5, Its 5, 6, N 6 Pt 4, S 561A N 1 Pt 13 N 2 Pt 4

**(b) Criminal P C (1898) S 369—Clerical error.**

In revision by the accused against his conviction at a summary trial the Crown Counsel stated that he could ... d any application under R 130, ... that

...

under ... the record of the case

*Held* that the case was not one of clerical error [Paras 2, 3, 4]

(46 Com) Cr P C S 369 N 2 Pt 1

*Cases referred* —

1 (45) 1945 O W N 238 33 A I R 1946 P C 18 71 I A 203 I L R (1945) Lah 1 I L R (1945) Kar P C 89 217 I C 1 (P C) Emperor v Nazir Ahmad
2 (28) 5 O W N 611 15 A I R 1928 Oudh 402 3 Luck 680 111 I C 573 Emperor v Shiva Datta
3 ('27) 14 A I R 1927 Lah 139 99 I C 1039, Mathra Das v Emperor
4 (28) 15 A I R 1928 Lah 462 10 Lah 1 110 I C 221 Raju v Emperor.
5 ('35) 22 A I R 1935 All 466 57 All 867 157 I C 1044 Banwari Lal v Emperor

*P N Chaudhri*—for Applicant
*K P Misra*—for Accused 1 to 3

**Order** — This is an application made on behalf of the Crown under S 561A, Criminal P C, praying that Criminal Revision No 127 of 1946, which was disposed of by me by an order dated 5 9-1946, be set down again for hearing in this Court after notice to the accused

[2] The application is made in the following circumstances Mani Ram, Ram Lal and Rameshwar were convicted at a summary trial for offences under rule 13 of the U P. Cotton Cloth and Yarn Control Order, 1943, for having contravened Rules 6 and 6 (a), and under Rule 81 (4) of the Defence of India Rules for contravention of Rule 12 (1), Cotton Cloth and Yarn Control Order 1943 (Central) read with Rule 121 Defence of India Rules At the hearing it was stated by the learned counsel for the Crown that he could not find on the record any application made by the prosecution under Rule 130 for trial of the case in a summary way I find the following observation made in the order with regard to this matter Rule 130 (4) is reproduced and the judgment proceeds

"It is clear, therefore that a contravention of the rules or orders mentioned in the charge for the breach of which the applicants have been convicted, could be made the subject of a summary trial only if there was an application made by the prosecution in this behalf (that is, for a summary trial) and on consideration of such an application the Magistrate thought it fit that he should try the case summarily This is a mandatory provision and a Court does not acquire jurisdiction to try a case summarily unless this is complied with .... .... In the absence of such an application the trial must be held to be illegal."

ble out of the estate to a widow in the family and that as such the assessee was entitled to claim exemption in respect thereof under S. 14 (1). It was further held that the provisions of a specified sum of maintenance under the will cannot be deemed to have affected or modified her right as a member of the family to be maintained out of the income of the estate. There is nothing to show that the respondent waived or renounced or surrendered that right in any manner or to any extent; on the other hand, from her conduct in getting the charge created on a part of the estate for her allowance it is manifest that she is cherishing the inherent and indefeasible rights that belong to her as a member of the family.

5. The Commissioner solicits a reference, suggesting that out of the findings of the Tribunal the following questions of law arise:

(i) Whether, in the circumstances of the case, there is material to hold that the allowance of Rs. 1000 per month received by the assessee from the Mahewa estate is referable to the will and codicil executed by her deceased husband, the late taluqdar of Mahewa?

(ii) If so, does the fact that the assessee also possesses the right to receive maintenance from the Mahewa estate make any difference to the taxability of the allowance received by her under the said will and codicil?

6. In paragraphs 2 and 3 of the annexure to the application the Commissioner has introduced an entirely new plea, viz., that under S. 14 (1) only those members of a Hindu undivided family, who have a vested interest in the source from which the payment is made, can claim exemption and that Mahewa is an impartible estate and consequently the assessee has no interest in the source from which the allowance was received. Obviously we cannot, at this stage, admit a new question of this description, which involves an inquiry into several matters concerning the tenure and character of the estate.

7. We are, however, of the opinion that a question of law is involved in this case and we therefore refer to the Chief Court of Oudh the following question under S. 66 (1) Income-tax Act:

"Whether the maintenance allowances received by Rani Bijay Raj Kunwari in Faslis 1345 and 1346 were received by her as a member of Hindu undivided family within the meaning of S. 14 (1), of the Act?"

Sd. Yahya Ali
President.
Sd. A. L. Sahgal,
Accountant Member.

[2] It will be seen that the material facts lie within a short compass and are not in dispute. Raja Rajendra Bahadur Singh, Taluqdar of Mahewa, died issuless leaving behind him his widow Rani Bijay Raj Kunwari, the assessee in the proceedings before the Tribunal. Under a will executed by the Raja his nephew, Raja Jai Inder Bahadur Singh succeeded to the estate. By the same will Raja Rajendra Bahadur Singh gave his widow a guzara or maintenance allowance of Rs. 500 per mensem. By a codicil dated 23-5-1913, he raised the guzara amount to Rs. 1000 per mensem. Under the will Rani Bijay Raj Kunwari's maintenance allowance was a charge "on the estate and on the possessor of the taluqa." It is the maintenance allowance received by her in 1345 F. (Rs. 11,000) and in 1346 F. (Rs. 13,000) that is the subject of the assessment. The sole question referred to us is whether the maintenance allowance received by Rani Bijay Raj Kunwari in these years was received by her as a member of a Hindu undivided family within the meaning of S. 14 (1), Income-tax Act.

[3] The case was argued before us at considerable length, and a large number of cases were cited. It appears to us, however, that the question which arises for consideration is simple and capable of only one answer. The contention of the learned counsel for the appellant was two-fold: (a) That the Mahewa Raj being an impartible estate the income thereof was not the income of the joint family, but that of the present holder of the Raj and accordingly any allowance paid out of it could not be said to have been received by the payee as a member of an undivided Hindu family, and (b) that the maintenance allowance was paid to Rani Bijay Raj Kunwari under the will and not by virtue of her being a member of the undivided family with Raja Jai Inder Bahadur Singh. Before addressing ourselves to these questions, we should like to clear the ground by stating that in view of what is said in para. 6 of the statement of the case, the matter in controversy before us should be kept free of any complications that might arise out of the nature of the estate owned by Raja Jai Inder Bahadur Singh, and the rights which Rani Bijai Raj Kunwari might have in that estate.

[4] It was contended by the learned counsel for the Income-tax Department that Mahewa estate was governed by the Oudh Estates Act, and in determining the question referred to us, we should keep in mind the special provisions of that Act. That Mahewa Raj was governed by the Oudh Estates Act for all purposes was a proposition which was disputed by the learned counsel for the respondent, and in support of his contention he relied on a decision of their Lordships of the Judicial Committee in 32 I. A. 203.[3] We will refrain from entering into this controversy as we must confine ourselves to the reference made to us, and to the facts as accepted by the Appellate Tribunal as the basis of the reference. We must, therefore, proceed on the assumption that there is an undivided Hindu family. That Raja Jai Inder Bahadur Singh, the present holder of Mahewa Raj, and Rani Bajai Raj Kunwari are both members of this family. That succession to the Raj is governed by the rule of primogeniture. It was also not disputed before us that, apart from the taluqdari property there is considerable non-taluqdari property owned by the joint family; that there are in existence a will and a codicil executed by Raja

on each of the three accused, Ramkripal, Munilal and Mahabir Choudhary.

Das J. — I agree On the construction of S 307, Criminal P C, sub s (3) of which indicates the powers of the High Court in dealing with a case submitted by the Sessions Judge under sub s (1), the view which has now found favour with their Lordships of the Judicial Committee is that the High Court will only interfere with the verdict of the jury if it finds the verdict "perverse, in the sense of being unreasonable" or "manifestly wrong", and the test laid down is that "no reasonable body of men could have reached the conclusion arrived at by the jury" The application of the test will depend on the facts of each case and involve the consideration of the entire evidence after giving due weight to the opinions of the Judge and the jury In a case where two views of the evidence can be taken, it is obvious that the view taken by the jury cannot be said to be "perverse" or one which no body of reasonable men could have taken Where the matter rests primarily on the believability of evidence, it may be difficult to draw the line between an "unreasonable view" and a "probable view," and the Judge may be tempted to think that a view other than his own is unreasonable, but the distinction between an "unreasonable view" and a "probable view" is an appreciable distinction and will in most cases, I think, depend on the nature compelling or otherwise, of the reasons for believing or disbelieving the evidence given, remembering always that the jury are the judges of fact

[14] Judged by the aforesaid standard, I am unable to say that the verdict of the jury is "unreasonable" in this case As to the point that the witnesses were biased, I would quote the following observations of their Lordships from the case referred to by my learned brother

"The charge that witnesses are biased always affords a legitimate ground of criticism of their evidence, and often for rejecting it in the absence of corroboration. It was essentially a matter for the jury to decide whether they would accept the evidence of interested witnesses."

[15] As to the statement alleged to have been made by Baliram to the investigating police officer, I agree with my learned brother that the learned Sessions Judge should have sent for the statement actually made by the witness and noted in the diary, when the investigating police officer was cross-examined on the point. I regret to have to say that the learned Sessions Judge has shown carelessness in this matter, and his attention should be drawn to the observations made in 10 Pat. 1[illegible] [illegible] P. L. T. 543[3]

N. S. D. *Reference rejected*

1947 P/51 & 52

A. I. R. (34) 1947 Patna 401 (C. N. 192.)

MANOHAR LALL AND BENNETT JJ.

*Medne Prasad Singh and others* — Appellants v. *Mt. Dulhin Shamsunder Kuer and another* — Respondents

Appeal No 143 of 1945 Decided on 8-11-1946, from appellate decree of Sub-Judge, Gaya, D/- 8-12-1944.

**Bihar Tenancy Act (8 [VIII] of 1885) S. 112B — Appeal against order reducing rent dismissed for default — Revision by Board of Revenue** [illegible]

Case referred

1 (45) 24 Pat 244 32 A I R 1945 Pat 170 221 I C 223 Balkrishna v. Ramkhelawan Singh

*K. Dayal* for *B. N. Rai* — for Appellants

*C. P. Sinha* — for Respondents

**Manohar Lall J.** — [illegible]

which the Rent Reduction Officer was directed to reconsider the case was ultra vires

[2] It appears that the tenants filed an application for reduction of rent under S. 112A, Bihar Tenancy Act The Rent Reduction Officer reduced the rent under cl (d) holding that the rent first became payable in 1916 Against this order there was an appeal to the Collector which was dismissed for default on 5th December 1939 The landlord then moved the Commissioner without success and ultimately he went up to the Board of Revenue who in the exercise of their revisional jurisdiction remanded the case for a fresh decision after taking into consideration the jamabandi papers produced by the landlord The case was then heard by another Rent Reduction Officer who rejected the application for reduction of rent The tenants' argument before the Court below was that the second order of the Rent Reduction Officer rejecting their application for reduction of rent must be treated as being [illegible]

to the decision of this Court in a [illegible] [illegible], the learned [illegible] [illegible] [illegible] that [illegible] [illegible] that in the [illegible] there was no order of the Coll[ector] [illegible] [illegible] the case [illegible] [illegible] was [illegible] the appeal for default [illegible] [illegible] in the [illegible]

said that the Collector passed any order by which he devoted his attention to consider whether the decision of the Rent Reduction Officer was right or wrong. This contention must be overruled in the peculiar circumstances.

[3] It was then argued that by Ex. C the case of these very tenants was not remanded by the Board of Revenue. It is impossible for us to come to a decision on this question, because in the first instance, this question was not raised before the learned Subordinate Judge in this form, and, secondly, because on the materials on the record it is impossible for us to decide this point satisfactorily. Moreover, the Court below has pointed out that the order of Mr. Ozair by which he held that this particular case was remanded to the Rent Reduction Officer was an order correct on the facts. This point must, therefore, be also overruled. The result is that the appeal fails and is dismissed with costs.

**Bennett. J.** — I agree.

N.S.D. *Appeal dismissed.*

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## A. I. R. (34) 1947 Patna 402 *[C. N. 133.]*

MANOHAR LALL AND DAS JJ.

*Srikishun Singh and others — Appellants* v. *Ram Janam Rai and others— Respondents.*

Appeals Nos. 77, 96 and 97 of 1945, Decided on 3-9-1946, from appellate decrees of Sub-Judge, Second Court, Arrah, D/- 15-1-1945.

(a) Bihar Tenancy Act (8 [VIII] of 1885), S. 112-A —Rent reduced under— Suit by landlords for arrears of rent at original rate on ground that rent reduction proceeding was without jurisdiction as all the landlords were not made parties— Onus is on landlords to prove that all necessary persons were not made parties to rent reduction proceedings. [Paras 4 and 5]

(b) Civil P. C. (1908), S. 100— Finding of fact— Bihar Tenancy Act (8 [VIII] of 1885), S. 112-A.

A finding that all necessary persons were made parties to the rent reduction proceeding under S. 112-A, Bihar Tenancy Act, is one of fact and cannot be challenged in second appeal when it is based upon an appreciation of evidence. [Para 5]

('44-Com.) C. P. C., S. 100 N. 28 Pt. 3.

(c) Bihar Tenancy Act (8[VIII] of 1885), S. 112-A — Original holding partitioned by tenants into three new holdings— Application by all tenants for reduction of rent of original holding— Reduction order deemed to relate to new holdings.

The tenants with the consent of the landlords partitioned the original holding into three new holdings. All the tenants subsequently made an application under S. 112-A for reduction of rent of the original holding ignoring the division and making all the landlords parties thereto. The rent of the original holding was reduced by the Rent Reduction Officer. In suits by the landlords to recover rent of each of the three new holdings at the rate of one-third of the original rental:

*Held* that the application for reduction of the original rent must be taken to be an application for reduction of rent of the three holdings and the rent reduction order must be deemed to have been passed for reduction of rent of the three new holdings and the landlords could only recover in each suit rent at the rate of one-third of reduced rent of original holding: 16 A. I. R. 1929 P. C. 171, *Rel. on.* [Para 6]

*Case referred:—*

1. ('29) 56 I. A. 238: 16 A. I. R. 1929 P. C. 171: 57 Cal. 205: 119 I. C. 618 (P. C.), Prafulla Nath v. Satya Bhusan.

*B. N. Mitter and A. K. Mitter* — for Appellants.
*D. N. Varma*—for Respondents.

**Judgment.**—These three appeals by the landlords have been heard together as they arise out of a single judgment passed by the learned Munsif involving a consideration of a common question of law. The appellants sued for recovery of arrears of rent for 1346 to four annas kist of 1350 Fasli. In the plaint they set out how the three holdings in the three suits came to be constituted as the result of a splitting up of an original single holding. The tenant defendants by a registered deed of partition bearing date 21-8-1928, effected a partition of the original holding and handed over the partition deed to the landlords all of whom agreed to the splitting up of the holding. It was alleged that each of the tenants was liable to pay rent annually at the rate of Rs. 11-8-6. It was also stated in the plaint that in the year 1939 the deceased father of one of the defendants made an application for reduction of rent of the original holding ignoring the splitting up into three holdings, and the rent reduction officer reduced the rental of that holding from Rs. 37 odd to Rs. 19-11 9, and this he had no jurisdiction to do. The plaintiffs therefore asked that a decree be passed against the defendants in the three suits at one-third of the original rental.

[2] The plea of the defendants in each suit was that there was no splitting up of the holding, that the partition deed was not acted upon, and that the rent reduction proceedings were with jurisdiction and could not be ignored.

[3] The trial Court came to these conclusions: (1) that the original holding had been split up into three holdings, (2) that the application to the rent reduction officer was made by a single tenant with regard to the original holding which was no longer existing, (3) that all the landlords and all the defendants were not parties to the rent reduction proceedings, and (4) that the rent reduction officer was never asked to reduce the rental of the three holdings. On these findings he came to the conclusion that the rent reduction officer had total lack of jurisdiction. Accordingly he decreed the suits against the defendants as claimed by the plaintiffs.

[4] Against this decision, three appeals were preferred to the learned Subordinate Judge who disposed them of by a single judgment. Before the learned Subordinate Judge, the tenants did

not challenge the finding of the learned Munsif that the original holding had been split up into three holdings The learned Subordinate Judge disagreed with the view of the learned Munsif

all the plaintiffs were not made parties in the rent reduction proceedings and that no notice of these proceedings was served on them He then examined the evidence in the case and drew an inference against the plaintiffs from the non examination of plaintiffs 1 and 2 and from the non production of the relevant papers of the rent reduction proceedings He came to this conclusion

Accordingly he allowed the appeal of the tenants and decreed the suit of the plaintiffs against each of the defendants for Rs 6-9 0 besides cess that is to say, one third of Rs 19-11 0 which was the reduced amount fixed by the rent schedule, Ex B Hence the three appeals to this Court

[5] Mr B N Mitter on behalf of the appellants argued that the learned Subordinate Judge was in error in coming to a finding that all the tenants and all the landlords were parties in the rent reduction proceedings He points out that the tenants have not produced the original application nor have they produced any other relevant papers to show that all these necessary parties were represented before the rent reduction officer or were parties in the rent reduction proceedings The argument is unsound because the onus was upon the plaintiffs to prove that all the necessary persons were not made parties in the rent reduction proceedings It is to be observed that the plaintiffs landlords themselves went up in appeal to the superior revenue Courts, but neither the grounds of appeal nor the appellate order has been produced in these proceedings before us Moreover the finding of the learned Subordinate

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i second appeal It must therefore, be held that all the landlords and all the tenants were parties to the rent reduction proceedings

[6] What then is the objection to the order of the rent reduction officer? The only objection is that the order purports to deal with a lump rental and not with three rentals to which the orginal rental and the reduced rental was distributed The position is analogous to what was considered by their Lordships of the Judicial Committee in 56 I A 238[1] In that case Lord Atkin in delivering the judgment of the Board made these observations at p 246

sell the tenures separately so as to give the purchaser power to annul the incumbrances on each separate tenure Their Lordsh ps are inclined to think that this

brought in respect of separate tenures the plaintiff must see that the subsequent process takes such a form that the tenures are in fact sold separately so that each may be redeemed separately by the incumbrancers of such separate part pursuant to S 170 etc etc

These observations support the reasonable conclusions adopted by the learned Subordinate Judge when he observes that on a consideration of all the relevant facts and circumstances in this case he must hold that the application

application for reduction of rent to show to us that the rent reduction officer was not asked to reduce the rent of the three separate holdings, but that they have not done

[7] For these reasons, we are of the opinion that the decision of the learned Subordinate

the date of the decision of the trial Court till today and thereafter at six per cent. per annum till realization.

G. N. *Appeals dismissed.*

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**A. I. R. (34) 1947 Patna 404** *[C. N. 134.]*

MEREDITH AND RAY JJ.

*Ram Prasad Singh and others—Defendants—Appellants v. Motiram Marwari and another—Plaintiffs—Respondents.*

Appeal No. 22 of 1946, Decided on 23-8-1946, from appellate order of Addl. Dist. Judge, Dumka, D/-11-12-1945.

**(a) Transfer of Property Act (1882), S. 6 (dd), —Heritable khorposh grant in lieu of maintenance—Interest of khorposhdar whether alienable — Liability to attachment—Civil P. C. (1908), S. 60 (1) (n).**

In deciding whether S. 6 (dd), T. P. Act and S. 60 (1) (n), Civil P. C. afford any protection to the judgment-debtor the crucial question is, is the judgment-debtor the holder of a bare incorporeal and personal right of future maintenance, or, is he the holder of an estate in property in lieu of maintenance? If the former, then manifestly the interest in question is protected from sale by the statutory provisions just referred to. If the latter, then equally manifestly those provisions have no application. It is true that S. 6 (dd) is in very wide terms. It speaks of a right to future maintenance in whatsoever manner arising, secured, or determined; but there is an essential difference between assigning property in lieu of maintenance and securing the right of maintenance upon certain property. *Prima facie* the holder of a heritable interest has something more than a bare right of future maintenance: 22 Mad. 372 and 23 A. I. R. 1936 Oudh 76, *Rel. on.* [Paras 3, 4]

A heritable *Khorposh* grant to appropriate the income of certain villages by way of maintenance was given by a proprietor of an impartible raj to the ancestor of the judgment-debtor:

*Held* that in the absence of proof of any special and peculiar custom in the family, it was a case of assignment of property in lieu of maintenance. The interest of the judgment-debtor could not be described as a bare right of future maintenance. The rights acquired were absolute rights in the property assigned and therefore S. 6 (dd), T. P. Act, and S. 60 (1) (n), Civil, P. C., had no application and the interest of the judgment-debtor could therefore be attached in exeution of a money decree against him: 12 A. I. R. 1925 P.C. 176, *Expl.; Case law referred.* [Paras. 8, 9]

('45-Com.) T. P. Act, S. 6, N. 13.
('44-Com.) Civil P. C., S. 60, N. 22.

**(b) Transfer of Property Act (1882), S. 6 (dd) — Retrospective operation—Applies to right to maintenance created prior to section.**

Per *Ray J*: Section 6 (dd) is intended to interdict transfer of properties answering the description of a right to future maintenance, irrespective of the time when the property or the right accrued. Its prospective operation has reference to the transfer of the property or the right. This section has nothing to do with the valid creation of the interest of the kind contemplated therein, but it aims at prohibiting its transfer when such a transfer is sought to be made after the section comes into force. [Para 19]

('45-Com) T. P. Act, S. 6 N. 14.

*Cases referred:—*

1. ('99) 9 M. L. J. 113 : 22 Mad. 372.
2. ('36) 23 A. I. R. 1936 Oudh 76: 158 I. C. 710.
3. ('25) 52 I. A. 262: 12 A. I. R. 1925 P. C. 176: 47 All. 385: 87 I. C. 295 (P. C.).
4. ('09) 36 I. A. 176: 36 Cal. 943: 4 I. C. 2 (P.C.).
5. ('36) 63 I. A. 441: 23 A. I. R. 1936 P. C. 332: 16 Pat 1: 165 I. C. 347 (P. C.).
6. ('44) 23 Pat. 871: 32 A. I. R. 1945 Pat. 162.
7. ('34) 61 I. A. 286: 21 A. I. R. 1934 P. C. 157: 56 All. 468: 150 I. C. 545 (P. C.), Collector of Gorakhpur v. Ram Sundar Mal.
8. (1900) 27 I. A. 151: 24 Mad. 147: 7 Sar. 761 (P. C.), Mallikarjuna Prasada Nayudu v. Durga Prasada Nayudu.
9. ('82) 4 Mad. 250, Naraganti v. Venkatachalapathy.
10. ('83) 8 I. A. 248: 8 Cal. 199: 4 Sar. 290 (P. C.), Raja Udaya Aditya Deb v. Jadub Lal.
11. ('88) 15 I. A. 51: 10 All. 272: 5 Sar. 139 (P. C.), Rani Sartaj Kuari v. Rani Deoraj Kuari.
12. ('96) 26 I. A. 83: 22 Mad. 383: 7 Sar. 481(P. C.), Sri Venkata Surya Mahi Pati Rama Krishna Rao v. Court of Wards.

*A. N. Lal and Ram Nandan Prasad*—for Appellants.
*R. S. Chatterji*—for Respondents.

**Meredith J.**— The decree-holder respondent seeks to execute his money decree by attachment and sale of the appellant judgment-debtor's interest in eleven villages. The appellant resists this prayer on the ground that he is a khorposhdar, and that his interest in the villages is a mere right of future maintenance which cannot be sold under S. 6 (dd), T. P. Act, S. 60 (1), (n), Civil P. C. and the express terms of his grant.

[2] It was admitted by both parties before the lower appellate Court that the villages in question were given by the proprietor of the Jamtara Raj, an impartible estate, to the ancestor of the appellant for maintenance of him and his male heirs in the male line in 1858, and it was admitted that the right acquired by the khorposhdar was a heritable one. There is no evidence as to the exact terms of the grant then made, or as to the special customs of the family, if any. It appears, however, that there was a dispute between the Raja and the then khorposhdar before the settlement authorities in the year 1910. They arrived at a compromise, which was filed before the settlement authorities and incorporated in the record of rights. This compromise and the entry in the record of rights were placed before the Court, and these documents show that the khorposhdar was recognized by the compromise to have the right to appropriate the income of the eleven villages, that right to descend to his male descendants in the male line, and on the extinction of that line the property was to revert to the estate. It was further provided that the khorposhdar or his descendants would not be at liberty to sell or transfer the properties or any portion thereof in any form, and, if they did so, the proprietor of the estate would be entitled to take back the properties into his *khas* possession.

[3] In deciding whether S. 6 (dd), T. P. Act and S. 60 (1) (n), Civil. P. C. afford any protection the

judgment debtor in this case the crucial question is, is the judgment debtor the holder of a bare incorporeal and personal right of future maintenance, or, is he the holder of an estate in property in lieu of maintenance? If the former, then manifestly the interest in question is protected from sale by the statutory provisions just referred to If the latter, then equally manifestly those provisions have no application It is true that S. 6 (dd) is in very wide terms It speaks of a right to future maintenance in whatsoever manner arising, secured, or determined, but, in my view, there is an essential difference between assigning property in lieu of maintenance and securing the right of maintenance upon certain property.

[4] *Prima facie* it would seem that the holder of a heritable interest has something more than a bare right of future maintenance, and this is the view adopted in Muthuraman Chettiar v Sundarakumara Ettappa Sami (9 M L J. 113[1]) by Subrahmania J and by a Bench of the Oudh Chief Court in Mt Bhagwati v Raghubar Dayal (A I R 1936 Oudh 76[2]) I concede that the grantor may adopt two attitudes He may say "I recognize your right of maintenance and in lieu of it and in extinguishment of my liability take these villages", or, he may say 'I recognize your right of maintenance and I am prepared to maintain you, but to save me trouble collect it yourself from the rents of these villages" The fact, however that the grant is made heritable seems to me a plain indication that the grantor *has adopted the former alternatives*, for, though a man may acquire a right of maintenance by birth, he cannot inherit it The plea that he is merely collecting the rents without any interest in the property is, to my mind, not available to any khorposhdar such as the judgment debtor who has acquired his rights by inheritance He cannot be heard to say that what he has inherited from his ancestors is a mere incorporeal right of future maintenance

[5] The judgment debtor in the present case, however, relies strongly on the decision of the Privy Council in Rajindra Narain Singh v Mt Sundar Bibi (52 I A 262[3]) which is, he says, a case where the facts, were very similar to the present case, and the Privy Council held that the interest of the judgment-debtor was a right of future maintenance which could not be sold in execution, though a Receiver might be appointed

[6] The difficulty created by this case seems to me to arise mainly from the [illegible] and the statement of facts made by the [illegible] and not from the actual wording of their Lordships' judgment Reading the judgment [illegible] fully it seems to me that the case before the Privy Council proceeded on the basis that the creditor in terms prayed to proceed against what he conceded was a mere right of future maintenance There is indeed a quotation in the judgment from that of the Subordinate Judge which would suggest that the decree holder had only asked for the appointment of a receiver, and the defence of the judgment debtor proceeded on the lines that under S 60, Civil P C a right of future maintenance could not be attached, and when you cannot attach you cannot appoint a receiver, a proposition not accepted *It is significant, I think, that in dis*agreeing with an expression of opinion, by the High Court that the interest could be attached and sold their Lordships said that they did not agree with the High Court on the subject of the *actual legal position of the right of maintenance* conferred upon the judgment debtor Moreover, in speaking of the terms of the compromise under which the right arose, their Lordships said that the substance of the agreement was that the judgment debtor, one of the two brothers parties to the compromise, was declared to *have a right of maintenance* in certain villages enumerated, the right being conferred expressly "without power of transfer"

[7] They added

> 'The Subordinate Judge correctly limited the issue between the parties to this maintenance question No *other point was brought before the Board*'

There is there, I think, a hint that other points might possibly have been brought before the Board.

[8] Apart from this, the *facts of* the Privy Council case differ from the *facts in* the present [illegible]

junior members of the [illegible]

[illegible]

independent [illegible] which had been previously recognised [illegible] settlement authorities, the names [illegible] having been previously entered [illegible] khorposhdar. It [illegible] cases inclu[illegible] cases, that [illegible] proof of a [illegible] family of wh[illegible]

in the present case, are absolute rights in the property assigned by way of maintenance, and are transferable. Two such cases are Durgadut Singh v. Rameshwar Singh (36 I. A. 176[4]) and Someshwari Prasad Narain Deo v. Maheshwari Prasad Narain Deo (63 I. A. 441[5]). There is also the authority of a Division Bench of the Patna High Court in Shiba Prosad Singha v. Lekhraj Shewakram & Co. (23 Pat. 871[6]), which is binding on us. In that case, it was held that a khorposh grant is neither a family arrangement nor a lease. After the grant the grantor has no interest whatever left in the property (save, of course, the right of reversion on failure of heirs to the grantee), and the grantee is the absolute owner thereof with an unrestricted power of transfer.

[9] In my opinion, the present is a case of assignment of property in lieu of maintenance. The interest of the judgment-debtor cannot be described as a bare right of future maintenance and S. 6 (dd), T. P. Act, and S. 60 (1) (n), Civil P. C., have no application. I find nothing in Rajindra Narain Singh v. Sundara Bibi (52 I. A. 262[3]) compelling me to take a different view.

[10] The appellant, however, relies also on the restrictive clauses in the compromise. It has been argued with much force that these restrictions against transfer are void under Ss. 10, 12 and 14, T. P. Act. Though certainly if there was an absolute grant of the property, the restrictions would be void on the ground of repugnancy and the creation of perpetuities, it is unnecessary to decide these points and whether any escape from that position could be found by reason of the fact that prior to 1929, S. 2, T. P. Act, provided that nothing in Chapter II (which includes Ss. 10, to 14) shall be deemed to affect any rule of Hindu, Muhammadan or Budhist law. The reason why it is unnecessary to consider this point further is that the restrictions against transfer if contractual and not statutory are only between the grantor and the grantee. The effect would, therefore, merely be to render alienations voidable by the grantor, and not void ab initio. Therefore, these restrictions could not prevent the creditor from selling the property and purchasing it, thereby stepping into the shoes of the judgment-debtor. This distinction was clearly pointed out in the case of Mt. Bhagwati v. Raghubar Dayal (A. I. R. 1936 Oudh 76[2]) to which I have already referred.

[11] In my opinion, the order of the lower appellate Court is correct, and I would dismiss the appeal with costs.

**Ray J.**—I agree to the order proposed by my learned brother and I wish to add the following words:

[13] The appeal is by the judgment-debtor challenging the validity of the judgment of the lower appellate Court declaring alienability of the properties in dispute and directing the same to be attached in liquidation of the judgment-debts of the decree-holder in a money suit.

[14] The properties in dispute consist of the judgment-debtor's interest in eleven mauzas of taluq Pabia which his ancestor got from the Jamtara Raj for maintenance. The controversy emerging as it does from the respective contentions of the parties turns upon whether the aforesaid interest of the judgment-debtor is interdicted from sale in execution. The judgment-debtor relies in support of his contention upon S. 6 (dd), T. P. Act, and S. 60 (1) (n), Civil P. C., and contends that the interest aforesaid is but a future right to maintenance within their meaning.

[15] The decree-holder's answer to the above contention of the judgment-debtor is the *right to future maintenance* contemplated in the sections aforesaid connotes a mere personal right enforceable in law, or, in other words, such as can form the basis of a cause of action for recovery of maintenance.

[16] At the outset it can be predicated with certainty the construction sought to be put by the decree-holder is too narrow to be entertained. Section 6 (dd), T. P. Act, reads as follows:

"A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred."

This clause is new and was added by the Amending Act of 1929. Before this there was a conflict of opinion as to whether a right to future maintenance fixed by a decree or charged upon immoveable property can be held alienable. It must be held that the Legislature added the new clause in its present form to set the controversy at rest so far as its words, comprehensive as they are, can do. It is quite plain, and manifest even if the right to future maintenance, in any particular case, is no longer in the category of a mere personal right enforceable in law, and has merged in a decree or grant charged upon movable or immovable properties, or fixed by assignment of or appropriation from a particular fund, it cannot be transferred. Section 60 (1) (n), Civil P. C. must, in its ambits of operation, fall in line with that of S. 6 (dd) of the Act, particularly both the provisions being legislations *in pari materia* with each other. To put any other interpretation would amount to detract from the plain grammatical meaning of the words used by the Legislature. To illustrate myself, I would take a case in which a decree for maintenance has been passed, and a charge on immovable property has been declared in its favour. The declared charge, there can be no

possibility of any doubt, is an interest in immovable property and is enforceable as a mortgage so far as may be A question may arise 'is the charge alienable? Before answering the question, the nature of this charge has to be further analysed It is a charge which takes a tangible shape only after the recurring right to periodical maintenance materialises and can be ascertained in terms of money The charge spends itself up when the right ceases to exist, generally on account of the maintenance holder's death Such a charge can be alienated, so far as it operates in respect of maintenance accrued and due but not for future maintinance that may or may not become due If you transfer in the latter case, you contravene the law as defined in S 6 (dd), T P Act. The same is the case when the charge is created by a grant or transfer *inter vivos*

[17] The same will be the case where the grantor in discharging his obligation to maintenance assigns the rents and profits of a specific property, or a particular fund, for being appropriated, from time to time in satisfaction of the maintenance, as and when right to it accrues, and so long as it enures A different consideration, however, arises when the recurring right to future maintenance of a person or a branch of a family or a person and his heirs at large, or heirs male, is sought to be provided for by giving certain properties, in consideration and in full discharge thereof The most apt illustration of such a disposition is furnished by khorposh grants, sometimes called, babuana grants in favour of junior member of a Raj Duration of such grants is limited by an ultimate right of reversion reserved in favour of the grantor or his heirs in the event of extinction of the grantor's line Such estates are generally made heritable and the heritability is limited to such heirs only as are entitled to maintenance under the law and custom governing the family or the estate as the case may be

[18] In relation to the properties sought to be attached and sold in the present case, the judgment debtor relying upon its description in the record of rights based upon a compromise between his ancestor and the holder of the Jamtara Raj and applying the dictum of the Privy Council in 52 I A. 262[3] urges that they are inalienable they being 'right to future maintenance" The rights of the judgment debtor are described in the petition of compromise filed n Commi sioner's Settlement Case No 274 of 909 10 in the following terms

' Be it noted that Sri Krishto Prosad Singh of Rampur ntra Tq Pabia has been enjoying the rents payable the raiyats of this village as entered in the Jamabandi l the income from the Hat etc and other income l in future he and his male descendants in the male line will realise and enjoy the same for all time but none of his descendants in his daught will enjoy it and in default of heirs as mention it will become khas of the propr etor and his dants And Krishto Prosad Singh and his desc as indicated above shall not be entitled to tran sale or otherwise the above right or any portion t If such transfer is made then the proprietor a heirs shall be entitled to take khas possession o property so transferred

The learned Munsif construed this to be a right to future maintenance as is contempl in S 6 (dd), T P Act and disallowed the dec holder s prayer for attachment The lear Subordinate Judge observed *inter alia* that 6(dd), T P Act was introduced by Act [X] of 1 and could not be given retrospective operati so as to govern the grant in question He fu ther held that the judgment debtor s intere sought to be attached is not a right to futur maintenance within the meaning of the section

[19] The first proposition of law enunciated by the learned Subordinate Judge must be forthwith ruled out as untenable To give effect to the contention of the judgment debtor deducible from the provisions of S 6 (dd), T P Act, it would not be necessary to give a retrospective effect to the section The section is intended to interdict transfer of properties answering the description of a right to future maintenance irrespective of the time when the property or the right accrued Its prospective operation has reference to the transfer of the property or the right This section has nothing to do with the valid creation of the interest of the kind contemplated therein, but it aims at prohibiting its transfer when such a transfer is sought to be made after the section comes into force

[20] With regard to the lower appellate Court s second proposition of law, to the effect that the judgment debtor s interest defined in the petition of compromise, the text of which has been quoted above, does not constitute the right of future maintenance it is urged that it is wrong in view of the decision of their Lordships of the Privy Council in 52 I. A 262[3] In my view, if the matter rested there, the dictum of their Lordships in the aforesaid decision would be a complete answer to the decree-holder s case The facts of the case before their Lordships of the Privy Council, so far as they can be inferred from the body of their Lordships' judgment independently of the statement of facts given by the reporter that precedes the judgment, are that there was a compromise agreement between two brothers of whom the [illegible] the judgment-debtor before their Lordships [illegible] was one of the two brothers, [illegible] promise, was declared to have a [illegible] tenance in certain villages [illegible] being conferred [illegible]

transfer. This property of the judgment-debtor in the aforesaid villages which the judgment-debtor got from his brother for maintenance was sought to be proceeded against by realising the rents and profits thereof through a receiver appointed for the purpose and the decretal amount paid out of the said realisation as far as possible. The judgment-debtor objected on the ground that this property was a right of maintenance and was not attachable under S. 60, Civil P. C. The Subordinate Judge dismissed the application agreeing with the contention of the judgment-debtor and holding that the judgment-debtor's property in the said villages were not liable to attachment and sale. The High Court, it is at least clear from the report, was not ready to agree with the Subordinate Judge in his view that the property in question could be described as a right to future maintenance which according to the High Court would mean only bare personal right of maintenance and nothing more. In the circumstances of that case evidently holding it to be property secured to ensure the right to future maintenance as distinguished from personal right to future maintenance, the High Court expressed the view that the appropriate method of execution would be by the appointment of a receiver. The High Court in this view of the matter reversed the decree of the Subordinate Judge. When the matter came before their Lordships of the Privy Council, the point no doubt was whether the judgment-debtor's interest was a right to future maintenance. In my view, if this was not the point, there would be no meaning to bring the appeal before the Privy Council and there would be no object in their Lordships saying what they are reported to have said in the following passage:

"Their Lordships do not agree with the High Court on the subject of the actual legal position of the right of maintenance conferred upon the judgment-debtor. That right of maintenance arose under a compromise which was made between the judgment-debtor and his brother. The compromise agreement is not produced, but its terms are said by the parties to be recorded in a decree pronounced by the Subordinate Judge of Jaunpur on 20-5-1915. The substance of this agreement is that the judgment-debtor one of the two brothers parties to the compromise, was declared to have a right of maintenance in certain villages enumerated, the right being conferred expressly 'without power of transfer'."

[21] It is urged, by the learned advocate for the decree-holder, that the only point before their Lordships of the Privy Council was that as the judgment-debtor's interest was not attachable under S. 60, Civil P. C., it could not also be proceeded against in the manner suggested by the High Court, that is, by appointment of a receiver etc. There is no doubt that this was one of the points before their Lordships but the question whether it was a right of maintenance at all was also before them and with reference to this position their Lordships are reported to have said:

"In the present case the Subordinate Judge in his judgment of 10-8-1920, correctly limits the issue between the parties to this maintenance question. No other point was brought before the Board."

It may be, as it appears from a part of the Subordinate Judge's judgment quoted in the judgment of their Lordships of the Privy Council, that the decree-holder called the judgment-debtor's interest in the villages as a property charged with right of maintenance and hence liable to be proceeded against by appointment of a receiver, while the judgment-debtor objected that that particular right consisting as it did in the villages granted for maintenance was a right to future maintenance, and, therefore, not attachable under S. 60, Civil P. C., and hence not liable to be proceeded against in the manner proposed by the decree-holder; but the learned Judges of the High Court ruling out the judgment-debtor's contention expressed themselves to say that the particular right in question not being a bare right to future maintenance could be proceeded against in the manner proposed notwithstanding S. 60, Civil P. C., This view of the High Court was, there can be no doubt, ruled out by their Lordships of the Privy Council in the passage already quoted above. It may be that their Lordships contrasted a bare personal right to future maintenance as against a right of maintenance secured by creation of some interest in immovable property by holding that the latter can be the subject of an equitable or indirect execution while the former cannot, but they made no distinction between the two with regard to both of them being equally not attachable and not saleable. It would be seen that in the first paragraph at p. 264 of the report their Lordships have unreservedly described the judgment-debtor's interest in the villages as his right of maintenance, and in the third paragraph of that page they have said:

"Their Lordships are of opinion that the right of maintenance is in point of law not attachable and not saleable. They think that S. 60, Civil P. C., head (n), precludes an application for that purpose."

[22] It may be further noticed that their Lordships in declaring realisation of the rents and profits of the property (subject of maintenance) by the appointment of a receiver as proper remedy do not do so unreservedly as they say that such a remedy lies in a fitting case.

[23] In my judgment this decision is an authority for the proposition that where for securing a right of maintenance some interest, without power

of transfer, is created in immovable properties that interest falls within the mischief of S 60 (1) (n) and for the matter of that S 6 (dd), T P. Act Their Lordships might be taken to have laid down that what is not transferable, not attachable and not saleable can be the subject of an equitable or indirect execution, but that is not the question before us I do not find any distinction between the interest of the judgment debtor, before their Lordships, in the 16 villages created under the compromise, and the interest of the present judgment debtor in the 11 villages before us Both are interests in immovable property created for satisfying either pre existing or newly created right of maintenance with a power to appropriate all its income but without a power of transfer In my view, there fore, 52 I A 262[3] *does fully support the judg*ment-debtor's contention, but in my view, in the present case the judgment debtor s interest in the disputed villages is something more than a right to future maintenance The compromise petition shows that formerly these villages constituted the *Khorposh* grant and the proprietor of the estate was recorded as malik by way of representing the *Khorposhdar* there by showing that the latter was in fact the malik This khorposh grant, it was admitted by both parties before the Subordinate Judge, comprised in the villages in question, was given by the Jamtara Raja to the ancestor of the judgment-debtor for the purpose of maintenance in 1858 The grant was heritable and limited in its duration till the khorposhdar s male line became extinct It has now to be determined whether such a grant can be called a right to future maintenance These grants have their origin in the joint ownership of the junior members of the family in the Raj The following quotation from Mayne on Hindu Law, 10th Edition, p 861 will go to make the matter clear

'In the latest case, 61 I A 286[7], the Privy Council have clearly laid down that the earlier judgments of ... regarded the ... however limi... based on the ... of the family,

Apart from custom or statute, the right of junior members to maintenance would seem to be co extensive with their right of survivorship As was pointed out by the Madras High Court in 4 Mad 250[9] which has often been approved by the Privy Council 'where ...

In substance, the position is that their right to joint ownership of the whole estate is for the time being limited to their enjoyment of such property as is sufficient in keeping with their status, for their maintenance Subject to the right of reversion in the eventuality of extinction of their line, they possess the full power over the properties so long as there is no express prohibition of transfer In 36 I A 176[4] while dealing with a babuana grant appertaining to an impartible estate, it was observed by their Lordships of the Privy Council at page 182 as follows

"...

tenance of the family and that on failure of male descendants, they reverted to the raj and became the property of the Maharaja for the time being or that the ...

In this particular case, so far as the original grant is concerned, it is not suggested that there was any provision express or implied that the interest granted should be inalienable

[24] In 63 I A 441[6] it was observed at page 447

'It is common ground that a village granted to a junior member in lieu of maintenance is resumable on failure of his male line, but until that event takes place, the grantor has no interest in the property The grantee is the absolute owner thereof, and has an unrestricted power of transfer If a transfer is made, the transferee ...

the property reverts to the grantor

I do not, however, understand that the aforesaid two decisions of the Privy Council intend to lay down that all grants of maintenance are alienable so far as the holders are concerned It is no doubt true that where properties are granted in full discharge of the obligation of maintenance, it is not a right to future maintenance simply because the consideration for the grant is liquidation of the total capitalised value of all future maintenance But where the grant consists in right to periodical appropriation of rents and profits of any property, and by appropriate words such as the grantee will have no interest in the lands or the grantee will have no power of disposition over the property," it is made clear that no interest in the landed or other parties is thereby transferred by the said right to appropriate the income

transfer. This property of the judgment-debtor in the aforesaid villages which the judgment-debtor got from his brother for maintenance was sought to be proceeded against by realising the rents and profits thereof through a receiver appointed for the purpose and the decretal amount paid out of the said realisation as far as possible. The judgment-debtor objected on the ground that this property was a right of maintenance and was not attachable under S. 60, Civil P. C. The Subordinate Judge dismissed the application agreeing with the contention of the judgment-debtor and holding that the judgment-debtor's property in the said villages were not liable to attachment and sale. The High Court, it is at least clear from the report, was not ready to agree with the Subordinate Judge in his view that the property in question could be described as a right to future maintenance which according to the High Court would mean only bare personal right of maintenance and nothing more. In the circumstances of that case evidently holding it to be property secured to ensure the right to future maintenance as distinguished from personal right to future maintenance, the High Court expressed the view that the appropriate method of execution would be by the appointment of a receiver. The High Court in this view of the matter reversed the decree of the Subordinate Judge. When the matter came before their Lordships of the Privy Council, the point no doubt was whether the judgment-debtor's interest was a right to future maintenance. In my view, if this was not the point, there would be no meaning to bring the appeal before the Privy Council and there would be no object in their Lordships saying what they are reported to have said in the following passage:

> " Their Lordships do not agree with the High Court on the subject of the actual legal position of the right of maintenance conferred upon the judgment-debtor. That right of maintenance arose under a compromise which was made between the judgment-debtor and his brother. The compromise agreement is not produced, but its terms are said by the parties to be recorded in a decree pronounced by the Subordinate Judge of Jaunpur on 20-5-1915. The substance of this agreement is that the judgment-debtor one of the two brothers parties to the compromise, was declared to have a right of maintenance in certain villages enumerated, the right being conferred expressly 'without power of transfer'."

[21] It is urged, by the learned advocate for the decree-holder, that the only point before their Lordships of the Privy Council was that as the judgment-debtor's interest was not attachable under S. 60, Civil P. C., it could not also be proceeded against in the manner suggested by the High Court, that is, by appointment of a receiver etc. There is no doubt that this was one of the points before their Lordships but the question whether it was a right of maintenance at all was also before them and with reference to this position their Lordships are reported to have said:

> " In the present case the Subordinate Judge in his judgment of 10-8-1920, correctly limits the issue between the parties to this maintenance question. No other point was brought before the Board."

It may be, as it appears from a part of the Subordinate Judge's judgment quoted in the judgment of their Lordships of the Privy Council, that the decree-holder called the judgment-debtor's interest in the villages as a property charged with right of maintenance and hence liable to be proceeded against by appointment of a receiver, while the judgment-debtor objected that that particular right consisting as it did in the villages granted for maintenance was a right to future maintenance, and, therefore, not attachable under S. 60, Civil P. C., and hence not liable to be proceeded against in the manner proposed by the decree-holder; but the learned Judges of the High Court ruling out the judgment-debtor's contention expressed themselves to say that the particular right in question not being a bare right to future maintenance could be proceeded against in the manner proposed notwithstanding S. 60, Civil P. C., This view of the High Court was, there can be no doubt, ruled out by their Lordships of the Privy Council in the passage already quoted above. It may be that their Lordships contrasted a bare personal right to future maintenance as against a right of maintenance secured by creation of some interest in immovable property by holding that the latter can be the subject of an equitable or indirect execution while the former cannot, but they made no distinction between the two with regard to both of them being equally not attachable and not saleable. It would be seen that in the first paragraph at p. 264 of the report their Lordships have unreservedly described the judgment-debtor's interest in the villages as his right of maintenance, and in the third paragraph of that page they have said:

> "Their Lordships are of opinion that the right of maintenance is in point of law not attachable and not saleable. They think that S. 60, Civil P. C., head (n), precludes an application for that purpose."

[22] It may be further noticed that their Lordships in declaring realisation of the rents and profits of the property (subject of maintenance) by the appointment of a receiver as proper remedy do not do so unreservedly as they say that such a remedy lies in a fitting case.

[23] In my judgment this decision is an authority for the proposition that where for securing a right of maintenance some interest, without power

of transfer, is created in immovable properties that interest falls within the mischief of S 60 (1) (n) and for the matter of that S 6 (dd), T P Act Their Lordships might be taken to have laid down that what is not transferable not attachable and not saleable can be the subject of an equitable or indirect execution, but that is not the question before us I do not find any distinction between the interest of the judgment debtor, before their Lordships in the 16 villages *created under the compromise and the interest* of the present judgment debtor in the 11 villages before us Both are interests in immovable property created for satisfying either pre existing or newly created right of maintenance with a power to appropriate all its income but without a power of transfer In my view therefore 52 I A 262[3] does fully support the judgment debtor s contention but in my view in the present case the judgment debtor s interest in the disputed villages is something more than a right to future maintenance The compromise petition shows that formerly these villages constituted the *Khorposh* grant and the proprietor of the estate was recorded as malik by way of representing the *Khorposhdar* there by showing that the latter was in fact the malik This khorposh grant, it was admitted by both parties before the Subordinate Judge comprised in the villages in question was given by the Jamtara Raja to the ancestor of the judgment debtor for the purpose of maintenance in 1858 The grant was heritable and limited in its duration till the khorposhdar s male line became extinct It has now to be determined whether such a grant can be called a right to future maintenance These grants have their origin in the joint ownership of the junior members of the family in the Raj The following quotation from Mayne on Hindu Law, 10th Edition p 661 will go to make the matter clear

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In substance the position is that their right to joint ownership of the whole estate is for the time being limited to their enjoyment of such property as is sufficient in keeping with their status, for their maintenance Subject to the right of reversion in the eventuality of extinction of their line they possess the full power over the properties so long as there is no express prohibition of transfer In 36 I A 176[4] while dealing with a babuana grant appertaining to an impartible estate it was observed by their Lordships of the Privy Council at page 182 as follows

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grant is concerned it is not suggested that there was any provision express or implied that the interest granted should be inalienable

(24) In 63 I A 441[5] it was observed at page 447

> It is common ground that a village granted to a junior member in lieu of maintenance is resumable on failure of his male line but until that event takes place the grantor has no interest in the property The grantee is the absolute owner thereof and has an unrestricted ...
>
> ... the property reverts to the grantor

I do not however understand that the aforesaid two decisions of the Privy Council intend to lay down that all grants of maintenance are alienable so far as the holders are concerned It is no doubt true that where properties are granted in full discharge of the obligation of maintenance it is not a right to future maintenance simply because the consideration for the grant is liquidation of the total capitalised value of all future maintenance But where the grant consists in right to periodical appropriation of rents and profits of any property and by appropriate words such as the grantee will have no interest in the lands or the grantee will have no power of disposition over the property, it is in clear that no interest in the landed or othe pert es is thereby transferred by the said right to appropriate the inc

made by the survivor and that the possession of the survivor till the commencement of the Bihar Act is rendered lawful.

[7] The provisions of the Act are so clear, that it is impossible to accept the argument of Mr. Ganesh Sharma. I would accordingly overrule the first objection.

[8] Mr. Ganesh Sharma then argued that it should have been held that the defendants had ousted the widow from the date of the death of her husband, and, therefore, a simple suit for partition was not maintainable. But the short answer to this contention is that the possession of a cosharer must be deemed to be possession of all unless clear ouster is proved. In the present case, the learned Subordinate Judge has pointed out that the plea of ouster was not taken in any of the paragraphs of the written statement. Accordingly, it is clear that the plaintiff had title to one-third share on the death of her husband in 1910 and on the facts of this case, she must be held to be in joint possession with the defendants so that she is entitled to claim a partition. No other point has been raised before us. The suit giving rise to this appeal was instituted on 6-10-1942 after the Bihar Act came into force. The result is that the appeal fails and must be dismissed with costs.

**Das J.**— I agree.

D.H. *Appeal dismissed.*

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## A. I. R. (34) 1947 Patna 412 *[C. N. 136.]*

MEREDITH AND RAY JJ.

*Gagan Bihari Das and another—Petitioners v. Sri Sarabhuj and others—Opposite Party.*

Civil Revn. No. 147 of 1943, Decided on 27-9-1946, against order of Collector, Balasore, D/- 12-7-1943.

(a) Orissa Tenancy Act (2[II] of 1913, as amended by Act 8 [VIII] of 1938), S. 31B—"Lawfully payable," meaning of—Court sale of occupancy holding before Amending Act—Mutation fee—Recoverability.

Per *Ray J.*—In S. 31B, the word "lawfully" means "in accordance with law" and the word "payable" means "what must be paid or what is due." [Para 10]

Per *Meredith J.*—The words "lawfully payable" in S. 31B can only mean payable under some law or custom having the force of law. [Para 13]

Per *Ray and Meredith JJ.*—Before the Amending Act of 1938, a transfer of an occupancy holding in execution of a mortgage or money decree was not valid against the landlord unless he had consented thereto. The landlord had an option in the matter of consent to and registration of the transfer in his zamindari books and the transferee had no right to have the transfer validated by registration. The demand and payment of fees for consent and registration was left to be determined by contract between the parties. Such fees therefore were payable not by virtue of any law but on account of a completed contract and could be recovered by suit on the contract under the general law and not under S. 31B as the fees cannot be said to be "lawfully payable at time of transfer" within the meaning of S. 31B. [Paras 6, 7]

Per *Ray J.*—The fees could not also be said to be recoverable under custom as such custom would be inconsistent with the provisions of S. 31 (4) as it stood before the Amending Act of 1938 and also would be unreasonable, uncertain and too modern to have the force of law. [Para 11]

Per *Meredith J.*—The only custom alleged was of payment on recognition of the transfer. As there was no recognition of the transfer in this case before the enactment of S. 31B no question of the fee being payable under custom before that date could arise. [Para 15]

(b) Interpretation of Statutes—Grammatical construction.

Per *Ray J.*—No doubt the words used by the Legislature must be interpreted in their plain, grammatical sense but if any word bears more than one such sense, the one that will lead to an absurd result, which it cannot be conceived that the Legislature could have in view, cannot be attributed to it in interpreting the statute. [Para 10]

*L. K. Das Gupta and G. G. Das*—for Petitioners.
*B. N. Das*—for Opposite Party.

**Ray J.**— This revision petition is filed by the plaintiffs in a suit for recovery of Rs. 36-4-0 from the defendants, auction-purchasers of an occupancy holding as mutation fee under S. 31 (B), inserted into the Orissa Tenancy Act (1913) by S. 8, Orissa Tenancy (Amendment) Act (VIII of 1938). The plaintiffs are co-sharer-proprietors in the estate within which the transferred holding is situate with a share of 6 annas 8 pies therein. The other co-sharers have not been impleaded as party defendants nor there is anything on record to show what their attitude is in relation to the subject-matter of the suit.

[2] The plaintiffs claim that by virtue of the provisions of S. 31 (B) read with S. 250 of the Act, they are entitled to maintain the suit and to recover the mutation fee, the sum claimed being their share in proportion to their interest in the proprietary right, of 25 per cent. of the consideration money for which the holding in question has been transferred. The defendants resist the suit impugning the suit as non-maintainable and pleading that *no fees were lawfully payable by them* at the time of the transfer which took place on 10-12-36, within the meaning of S. 31 (B).

[3] Section 31 (B) (1) invoked in aid of the suit reads as follows:

> "Notwithstanding anything contained in this Act, any transferee, who obtained a transfer of an occupancy holding or a portion or a share thereof, before the commencement of the Orissa Tenancy (Amendment) Act 1938, shall be liable to pay the fees lawfully payable by him at the time of the transfer, within three years from the coming into force of that Act or the date of the landlord's knowledge of the transfer whichever is later, but he shall not be liable to ejectment on the ground that the landlord has not given his consent to the transfer."

[4] According to this section, the period of limitation provided for enforcement of the lia-

bility is three years from the coming into force of the Orissa Tenancy (Amendment) Act 1938 or the date of the landlord s knowledge of the transfer whichever is later There is nothing in the judgment of the trial Court to show when the plaintiffs came to know of the transfer in issue The question of limitation seems to have been completely lost sight of in the Courts below The lower appellate Court in setting out the facts of the case says

'On 10 12 1936 the defendants purchased a a holding in Civil Court sale The plaintiff who is h s landlord in respect of the holding came to know of the sale after the Oris a Tenancy Act was amended in in 1938 and demanded mutation fee at 25 per cent of the consideration money proportionate to his share The defendant refused to pay

On the facts as set out it is difficult to say if the suit was in time or out of time It is not clear if the plaintiff s knowledge of the trans fer was in 1938 or later In case it was in 1938, the suit would have been barred by three years rule of limitation

[5] The question, therefore that remains to be decided is whether the claimed fees were lawfully payable by the defendant at the time of the transfer This takes me back to ascertain what the law was with regard to the transferee s liability to pay the fees before the commence ment of the Orissa Tenancy (Amendment) Act 1938 At the relevant time Ss 31 and 250 of the Orissa Tenancy Act, 1913 (Bihar and Orissa Act XI of 1913) were the law in force on the sub ject Section 31 of the Act deals with the position of the transferees of occupancy holdings vis a vis the landlord of the holding Till this Act came into force occupancy holdings in Orissa were non transferable Some change in this respect was effected by the Act They were de clared not liable to ejectment by the landlord except in execution of a decree for ejectment passed on the grounds (a) that he has used the land comprised in his holding in a manner which renders it unfit for the purposes of the Tenancy or (b) that he has broken a condition consistent with the provisions of this Act and on breach of which he is under the terms of a contract between himself and his landlord liable to ejectment (see S 29 of the Act) With regard to the transfer, it was provided in S 31 (4) that

'Save as provided in this section and Ss 95 and 96 no transfer of an occupancy holding or portion of a holding otherwise than by succession or by sale in execution of a decree for arrears of rent shall be valid against the landlord of the holding unless and until he has consented thereto

[6] The opening words of the sub section 'Save as provided in this Section and Ss 95 and 96 lead us to examine the provisions referred to there in their applicability to transfer of an occupancy holding Section 95 prescribes some restrictions on transfer by sub letting and S 96 on transfer by usufructuary mortgage Any transfer by sub-letting or usufructuary mortgage for any period, express or implied, which exceeds or might, in any possible event exceed 9 years, were considered invalid The provisions in S 31 referred to in Sub S (4) of the section are to the effect that in case of transfer of an occu pancy holding or a portion thereof *by private sale* the transfree or his successor was entitled to apply to the landlord for registration on payment of the maximum fee equal to 25 per cent of the consideration or 6 times the annual rent of the holding or portion whichever was greater and on the landlord s refusal to accept the fee, he was entitled to appeal to the Collector who should in the absence of good and sufficient reasons enumerated in Explanation to Sub S 3 of the section, cause the said fee to be delivered to the landlord declaring the transfer to be duly registered Such a transfer according to sub s 3 referred to above was binding against the land lord The combined effect of sub ss 1 to 3 and 4 of s 31 is that transfer by private sale regis tered in the manner prescribed in the section, transfer by succession transfer by sale in exe cution of a decree for arrears of rent and trans fers by sub letting or usufructuary mortgage within the restrictions prescribed in Ss 95 and 96 were the only transfers which were consider ed valid against the landlord Other transfers were not valid against him *unless and un til he had consented thereto* (vide last por tion of Sub s (4) of S 31) The question arises whether the transfer of the disputed lands in favour of the defendant in execution of a mort gage decree by civil court sale was a valid transfer within the meaning of sub s (4) of S 31 It is quite plain that the transfer in question, is not a transfer by private safe nor is it one in execution of a decree for arrears of rent and as such it was not valid against the landlord be fore the commencement of the Orissa Tenancy (Amendment) Act 1938 far less at the time of the transfer It was particularly so as it was not consented to by the time the Act came into operation It should be borne in mind that no amount of custom or usage could make the transfer valid inasmuch as it would be incon sistent with the provisions of S 31 (4) (*vide* S 237, Orissa Tenancy Act 1913) The only event in which the transfer could be valid against the landlord was that of landlord s consent which as I have said, was never given before the commencement of the Orissa Tenancy (Amend ment) Act'1938

[7] The validity of a sale of the kind we are concerned with in this case is not so much

asked the appellant as to whether he would cross examine them, when the appellant said that he would not. The witnesses were accordingly discharged The Magistrate fixed the next day as the date for further hearing of the case On this date namely 11-8 1915 three witnesses for the prosecution were examined and a charge under S 376 Penal Code, was framed The Magistrate after the framing of the charge on this date asked the appellant as to whether he would cross examine the witnesses after charge The appellant declined to do so So the witnesses were discharged The appellant was also asked whether he would cross-examine the five witnesses examined on 10 8 1915 and here again the appellant declined The case for the prosecution therefore was closed and the appellant was examined under S 342, Criminal P C The Magistrate records that he questioned the accused as to whether he wished to examine any witnesses if so he should name them and they would be summoned but the appellant replied in the negative Thereafter arguments were heard and 13th August was fixed as the date for delivery of the judgment but the Magistrate postponed the matter until 14th August when he delivered his judgment convicting the appellant On both these dates the accused was present Under S 256 Criminal P C the normal course to pursue by a Magistrate in a warrant case after charges have been framed is to question the accused at the commencement of the next hearing as to whether he wishes to cross examine any of the prosecution witnesses But S 256 also permits a Magistrate to ask such a question of an accused immediately after the framing of the charge provided he records in writing his reasons for doing so In this particular case the Magistrate did not record his reasons for asking the accused immediately after the framing of the charge as to whether he wished to cross examine any of the prosecution witnesses. The question before us is whether the omission to record reasons is in itself sufficient to vitiate the proceedings or whether it is an irregularity curable under S 537 of the Code Two decisions of this Court which are binding upon us are to be remembered when considering this question namely, 13 P L T 813[1] and 25 Pat 227[2] Both these cases are clearly authorities, in my opinion, for the proposition that the omission to record reasons is not in itself sufficient to vitiate the trial but is an irregularity curable under S 537, Criminal P C, provided the irregularity has not caused a failure of justice or that the [illegible] particular case [illegible] prejudice to the [illegible] addition to the view of this Court [illegible]

in the two decisions just cited, there appears to be the view of the Bombay High Court in A I R. 1930 Bom 241[3] to the same effect where the view of Pathar J. in 53 Bom 578[4] has been approved There is similarly the decision of a single Judge of the Allahabad High Court in 40 ALL 316[5] to the same effect and the decision of Sir Shadi Lal C J of Lahore High Court in A I R 1926 Lah 153[6] Mr Chakravarti, however, relied upon the decision of Campbell J in A I R. 1925 Lah 339[7] and the decision of Jackson J in A I R 1927 Mad 78[8] for the contrary view It is unnecessary for me to go into the decisions of these two learned Judges who have taken the contrary view for I am bound to follow the decisions of our own Court Mr Chakravarti, however, had referred also to 5 Pat 110[9] but the facts of that particular case are to my mind distinguishable and in the light of the two later decisions of this Court, what I have to determine is whether there has been in the circumstances of this particular case prejudice to the appellant by the failure of the Magistrate to record his reasons for asking the accused forthwith after the framing of the charge as to whether he wished to cross examine the prosecution witnesses It seems to me that right from 10th August to the date of judgment the attitude of the appellant was that he was not interested in the trial. He was asked after framing of the charge whether he wanted to cross-examine the prosecution witnesses but he declined He was asked whether he would name any defence witnesses if so, the Magistrate would call them, but he declined All this took place on the 11th From 11th to the 13th August there was an interval of time and on 13th August when judgment was not delivered, if the accused felt that he wished to defend himself, he could have told the Magistrate either that he wished to cross-examine the witnesses or to have named the defence witnesses whom he wanted to be summoned Whether such a prayer would have been allowed or not is a different matter, but it is [illegible] of the appellant which I am considering and it certainly pays no [illegible] [illegible]

1937 P [illegible]

miscarriage of justice owing to the failure on the part of the Magistrate to record his reasons for questioning the accused immediately after the charge as to whether he wished to cross-examine the prosecution witnesses. Even in his grounds of appeal he makes no complaint that if he had been given an opportunity, he would have been able to secure proper legal advice or that if he had been given further time he would have cross-examined the prosecution witnesses. On the other hand, he states in his grounds of appeal that he is a poor man and therefore has not been able to defend the case properly. In my judgment having regard to the observations of Harries C. J. in 19 P. L. T. 845,[1] it seems to me that the failure to record reasons under S. 256 of the Code for questioning the accused forthwith after the framing of the charge as to whether he wished to cross-examine the prosecution witnesses is not in itself an irregularity which vitiates the trial. I have examined the conduct of the accused in the course of the trial and it appears to me that at no time did he wish to defend himself although he pleaded not guilty to the charge which was framed and there is nothing on the record to show that there has been a failure of justice or that he has been prejudiced in any way.

[4] I would, however, like to draw the attention of the learned Magistrate that a trial before him when exercising powers under S. 30, Criminal P. C., is not similar in procedure to that adopted in a Court of Session and that it would be better if he were to observe, as far as possible, the procedure indicated in S. 256, Criminal P. C. strictly. The case reported in 25 Pat. 227[2] is also from his judgment and I would suggest that where a normal course is indicated in S. 256 itself it is desirable that that procedure should be followed in the first instance and that the other procedure is exceptional although legal.

[5] Lastly it was urged that the sentence was severe. In my opinion it is not at all severe. A little girl was raped and act of the appellant cannot be regarded with any leniency. I would accordingly dismiss the appeal but would alter it from the nature of transportation to rigorous imprisonment.

**Bennett J.** — I agree.

K.S. *Sentence altered.*

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**A. I. R. (34) 1947 Patna 418** *[C. N. 138.]*

FAZL ALI C. J. AND REUBEN J.

*Surendra Nath Sarkar — Petitioner — Appellant* v. *Nagar Chand Goenka and another — Respondents.*

Appeals Nos. 119, 121 and Civil Revn. No. 283 of 1946, Decided on 24-9-1946, from original orders of Sub-Judge, Purnea, D/-21-3-1946 and 11-1-1946, respectively.

(a) **Civil P. C. (1908), O. 43, R. 1 (s)—Order refusing to discharge receiver —No appeal lies:** *Case-law discussed.* [Para 1]

('44-Com.) C. P. C., O. 40, R. 1 N. 51 Pts. 3, 4, 5.

(b) **Civil P. C. (1908), O. 40, R. 1 — Duration of receivership — One party becoming exclusively entitled to property pending proceedings—Effect.**

*A* and *B* formed a partnership for three years with regard to the business of a rice-mill owned by *A*. On the expiry of three years the mill was to revert to *A* as his property. Under a clause in the partnership deed *A* referred a dispute between him and *B*, the managing partner to arbitration under the Arbitration Act. The proceeding was treated as a suit and a receiver appointed at the instance of *A*:

*Held* that even though the period of three years of the partnership expired during the pendency of the suit, and the mill reverted to *A* as his property, the Court had jurisdiction to allow the receiver to continue so long as the suit was pending before it. The arbitration proceeding being analogous to a *suit for accounts and dissolution* of partnership the Court had jurisdiction to retain the receiver. [Para 2]

('44-Com.) C. P. C., O. 40, R. 1, N. 48.

(c) **Civil P. C. (1908), S. 115—Powers in revision —Power to enter into merits—Lower Court refusing to discharge receiver—Lower Court acting within jurisdiction—High Court cannot go into merits of matter.** [Para 2]

('44-Com.) C. P. C., S. 115, N. 13.

*Cases referred:—*

1. ('26) 53 Cal. 319 : 13 A. I. R. 1926 Cal. 593 : 92 I. C. 940, Sripati Dass v. Bibhuti Bhusan Datta.
2. ('33) 60 Cal 162 : 20 A. I. R. 1933 Cal. 52: 142 I. C. 79, Manmohan Niyogi v. Surendrakumar Ray.
3. ('38) 25 A.I.R. 1938 Rang. 387: 1938 Rang. L.R. 586: 178 I. C. 924, Abdul Kadar v. R. M. P. Chettyar Firm.
4. ('16) 20 C. W. N. 789 : 3 A. I. R. 1916 Cal. 824 : 34 I. C. 789, Eastern Mortgage & Agency Co. Ltd. v. Premananda Saha.
5. ('24) 46 M. L. J. 196 : 11 A. I. R. 1924 Mad. 614 : 78 I. C. 625, Ramaswami Naidu v. Ayyalu Naidu.
6. ('31) 18 A. I. R. 1931 All. 72 : 134 I. C. 454, Anthony Ullyssess John v. Agra United Mills Ltd.

*B. C. De, J. M. Ghose, N. N. Roy and S. S. Rakshit* — for Appellant.

*B. N. Mitter, A. K. Mitter and S. A. R. Bilgram* — for Respondents.

**Fazl Ali C. J.**— These are appeals against an order refusing to discharge a receiver, and the first point to be decided is whether such an appeal is maintainable. Under O. 43, Civil P. C., an appeal may be preferred against an order passed under R. 1 of O. 40, and it is urged on behalf of the appellant that an order refusing to discharge a receiver is virtually covered by O. 40, R. 1. Order 40, R. 1 merely enables the Court to appoint a receiver of any property which is the subject-matter for suit whether before or after the decree. It is contended that under the General Clauses Act the power of removing a receiver must go with the power of appointing a receiver, and if the order for removing a receiver is appealable, an order refusing to remove or discharge a receiver must also be appealable. Mr. De, who has argued this point with great lucidity and skill, relies in

port of his argument on 53 Cal 319[1] and 60 162[2] in which it has been held that an er directing the removal of a receiver is pealable The only case in which it has been ld that an order refusing to remove a receiver also appealable is A I R 1938 Rang 337,[3] ut, on the other hand, there are a series of ases in which it has been held that an order efusing to remove a receiver is not appealable 20 C W N 789,[4] 46 M L J 196[5] In A I R 1931 ALL 72[6] it was held that where a Court appointing a receiver under O 40 removes him from his office there is no right of appeal under O 43 On this point there seems to be some conflict of opinion and I shall refrain from expressing any opinion on it in this case, but it appears that the balance of authority is in favour of the view that the order refusing to discharge a receiver is not appealable, and I have no hesitation in coming to the same conclusion It is conceded that the right of appeal against an order refusing to discharge a receiver has not been expressly conferred by any of the clauses of O 43, but it is contended that the right of appeal must be deemed to have been conferred by implication, because the authority which has power to appoint a receiver must also by implication be deemed to have power to remove, and if there is a refusal to remove a receiver that refusal must have been ordered under the powers conferred by O 40, R 1 In my opinion, the best reply to this line of reasoning is offered in A. I R 1931 ALL 72[6] just referred to, in these words

'Where a right of appeal has to be expressly conferred by statute, it cannot be presumed to exist by recourse to a rule of analogy or a rule of logic '

I have, therefore, no hesitation in holding that this appeal cannot be entertained as an appeal

[2] Mr De, however, contends that his memorandum of appeal should be treated as an application in revision and that it should be held that the order of the Court below is without jurisdiction In order to appreciate this point it will be necessary to refer to certain facts It appears that the plaintiff and the defendant entered into a partnership with regard to the business of rice mill for a period of three years and later on the plaintiff being dissatisfied with the management of the defendant, who had become a managing partner under the agreement of partnership, had recourse to a clause in the partnership deed which provided that in case of any dispute or difference arising between the parties such dispute or difference shall be referred to arbitration in accordance with the provisions of the Arbitration Act. In accordance with this clause a proceeding was started under the Arbitration Act and that proceeding is treated as a suit In this proceeding a receiver was appointed at the instance of the plaintiff and in spite of the opposition of the defendant Now the plaintiff has asked the Court to remove or discharge this receiver, and the defendant has opposed his prayer The learned Subordinate Judge who was asked to remove the receiver has held that the receiver cannot be removed The argument put forward by Mr De is that inasmuch as the partnership was to come to an end after the expiry of three years and upon the expiry of that period the mill which was worked as a result of the partnership agreement was to revert to the original position and become the property of the plaintiff, the Court had no jurisdiction to direct that the receiver should continue to manage a mill which is now the exclusive property of the plaintiff (appellant) In my opinion, the argument is not sound in law The learned Subordinate Judge has the jurisdiction to allow the receiver to continue so long as the suit is pending before him It must be remembered that the proceeding in the Court below is more or less analogous to a suit for account and dissolution of partnership and until the account is fully rendered the Court has the jurisdiction to retain the receiver Mr De drew our attention to the fact that in this particular case it would work great hardship upon his client if the receiver is allowed to continue to manage the mill, and he also referred to the fact that in this proceeding it is his client who is the plaintiff and who has come to Court as an aggrieved party complaining against mismanagement by the defendant This Court, however, cannot in dealing with an application in revision go into the merits of the case It is for the learned Subordinate Judge who is in seisin of all the facts of the case to consider what is the equitable order to be passed in the present proceeding, and I have no doubt that the learn ed Subordinate Judge will bear in mind th equities of the case when he is asked to pass a order affecting the property of which the plai tiff claims to be the owner I see, howeve that this proceeding is being unduly prolong and I would direct while dismissing the appe and the revision that the arbitration proceed should be brought to a conclusion with utn expedition and without undue delay, and Court should see that neither party is preju ed by the mill being managed in an ineffi manner The respondents will get their co appeal

**Reuben J** — I agree

*Revision dismis*

G N

**A. I. R. (34) 1947 Patna 420** *[C. N. 139.]*

MANOHAR LALL AND DAS JJ.

*Tirloknath Tewari—Appellant* v. *Ram Ran Bijay Prasad Singh—Respondent.*

Appeals Nos. 52 and 59 of 1945, Decided on 26-9-1946, from appellate decrees of Sub-Judge, Arrah, D/-15-9-1944.

(a) Bengal Cess Act (9 [IX] of 1880), S. 4—Cultivating raiyat and tenure-holder.

The expressions "cultivating raiyat" and "tenure-holder" have a special meaning in the Cess Act which is different from the meaning attached to them in the Bengal Tenancy Act. [Paras 3, 9]

(b) Bengal Cess Act (9 [IX] of 1880), Ss. 4 and 41—"Cultivating raiyat," meaning of—Rent varying with area cultivated each year—Effect.

The rent for a holding was fixed at a certain rate per bigha, and calculated on that basis, the total amount of rent for the whole holding exceeded one hundred rupees. But there was a further stipulation that the rent *in any year was payable only for the area actually* cultivated. In the years in suit the rent actually payable was less than hundred rupees and it was contended that for those years the person must be treated as a cultivating raiyat for purposes of the Cess Act:

*Held* that the contention was not tenable and that the question whether the person was a cultivating raiyat or not was to be determined with reference to the rent fixed for the whole holding and not the rent payable for the area actually cultivated. [Paras 3, 11]

(c) Bengal Cess Act (9 [IX] of 1880), S. 93—Jurisdiction of Civil Court.

Section 93 bars a suit in which the contention is merely that the decision of the Cess Department is wrong. Hence, in a suit for recovery of cess it is not open to the defendant to contend that he was wrongly assessed by the Cess Department as a tenure-holder and that he ought to have been assessed as a cultivating raiyat only: *Case law discussed.* [Para 5]

*Cases referred:—*

1. ('25) 90 I. C. 621: 13 A. I. R. 1926 Pat. 175, Kesho Prasad Singh v. Ram Swarup Abir.
2. ('38) 19 P. L. T. 352: 25 A I. R 1938 Pat. 362: 17 Pat. 436: 174 I. C. 752 Braju Behari Das v. Ram Narayan Rai.
3. ('27) 8 P. L T. 643: 14 A. I R. 1927 Pat. 270: 6 Pat. 13: 102 I. C. 365, Abdul Hasan v. Ashgar Ali.
4. ('46) 33 A. I. R. 1946 Pat. 200: 24 Pat. 705: 227 I. C. 612, Kameshwar Singh v. Janki Raman.

*D. N. Varma and Murtaza Fazl Ali*—for Appellant (in No. 52).

*Sarjoo Prasad and Kanhaiyaji*—for Respondent (in No. 52) and for Appellant (in No. 59).

**Das J.**— These two appeals arise out of the same judgment, and have been heard together. One of the appeals, namely, S. A. No. 52 of 1945 is by the defendant, and the other appeal, S. A. No. 59 of 1945 is by the plaintiff. The main questions, which arise for decision in the two appeals, are (a) the rent payable by the defendant in the years in suit in respect of the lands in question, and (b) cess payable for the same. The two appeals arise out of a suit for recovery of rent and cess for the period 1346 to eight annas kist of 1350 Fasli. The plaintiff is the sixteen annas proprietor of the village in which the defendant holds 149 bighas 18 kathas and 8 dhurs of lands. The lands are in two blocks, one of 70 bighas, and the other of 79 bighas odd. The quality of the soil of the two blocks is not the same; one of the blocks is of inferior quality and the other of superior quality. The admitted position is that rent payable for the superior quality block is Rs. 5-3-6 per bigha and that for the inferior quality block is Rs. 2 per bigha. It is further admitted that the defendant has to pay rent for the area actually cultivated in a particular year. There was a dispute in the trial Court as to the particular areas which were cultivated in the years in suit. The learned Munsif accepted as correct the areas of cultivable land as given in the plaint in the years in suit. This finding has not been disturbed in appeal, and learned counsel for the defendant-appellant has not raised this question before us. It must, therefore, be taken that no question as to the areas of land cultivated in the years in suit arises now. There was, however, a dispute between the parties if the areas cultivated in the years in suit appertained to the superior quality block or the inferior quality block. The finding of the learned Munsif was that the lands so cultivated belonged to the inferior quality block and rent was payable at the rate of Rs. 2 per bigha. The Court of appeal, however, has reversed this finding and has held that the lands cultivated in the years in suit appertained to the superior quality block and rent was payable at Rs. 5-3 6 per bigha. The defendant-appellant is aggrieved by this decision and one of the points in the appeal preferred by the defendant-appellant relates to this question.

[2] As to cess, the plaintiff claimed cess at Rs 38-15-9 a year. The defendant-appellant contended that cess was payable by him as a cultivating raiyat at six pies per rupee of the rent realizable for a particular year. The learned Munsif accepted the contention of the defendant and passed a decree accordingly. The Court of appeal below has reversed the decision of the learned Munsif and has held that cess is payable at Rs. 35-13-0 a year minus half anna per rupee on the amount of rent realizable in each year. Both the parties are aggrieved by this decision of the Court of appeal below on the question of cess, the defendant contending that cess is payable only at the rate of six pies per rupee of the rent realizable for a particular year, and the plaintiff contending that cess is payable at Rs. 38 15-9 a year. The appeal of the plaintiff is, therefore, confined to the question of cess only, whereas the appeal of the defendant raises both the questions, namely, of rent as well as cess. (After discussing the question of rent and holding that it turned on a question of fact as to which there was no sufficient reason for disturbing the finding of the lower appellate Court, the judgment proceeded.)

The question of cess, however, presents ter difficulties The tenancy appears to e been created by a patta (Ex E) of the year Fasli The rent payable for the lands is not p rental but is fixed at a rate per bigha and uld vary from year to year according to the a cultivated in a particular year Learned unsel for the defendant appellant has placed re-ance on two judgments (Exs 8 and B) and also on e decree (Ex C) The judgment (Ex 3) and the ecree (Ex C) no doubt show that the defendant was held to be an occupancy *raiyat* in respect of the lands in question The judgment (Ex 3) further shows that the rate of rent per bigha, in accordance with the stipulations of the *patta* of 1308 is payable in respect of only the cultur able lands found on measurement every year The judgment (Ex B) shows that in a rent suit of 1921 cess was allowed at six pies per rupee on the annual rent paid per year The question of the status of the defendant under the Cess Act was not, however, in issue in that suit and there was no discussion of the question in the judgment The plaintiff, on the contrary, relies very strongly on the schedule of valuat on prepar ed by the Cess Revaluation Officer, subsequent to the aforesaid judgments This document is ex hibit 2 in the record, and shows the defendant as a tenure holder for the purpose of the Cess Act, and the annual valuation of the entire hold ing is shown at the sum of Rs 886 6 0 The con tention of the plaintiff is that the defendant must pay cess as a tenure holder, that is, at the rate of one anna on the annual value of the land comprised in the tenure, less a deduction calculated at ½ anna for every rupee of the rent payable for the tenure, which is Rs 525 2 6 According to the plaintiff s calculation, cess is payable at one anna per rupee on Rs 886 6 0 less deduction of ½ anna per rupee on Rs 525 2 6 If calculated in this way, the cess comes to Rs 38 15 9 a year Learned counsel for the plaintiff has also referred to S 93 Cess Act and has contend ed that the valuation fixed by the Cess Revalua tion Officer is open to revision by the Commi ssioner or the Board of Revenue, and cannot be interfered with by the Civil Court There is in my opinion, no doubt that the status of the defendant for the purpose of the Cess Act must be considered with reference to the provisions of the Cess Act As has been pointed out in numerous decisions the expressions 'cultivating *raiyat*' and 'tenure holder" have a special meaning in the Cess Act, which is different from the meaning attached to them in the Bengal Tenancy Act The Cess Act defines a cultivating *raiyat* as meaning a person cultivating land and paying rent therefor not exceeding one hundred rupees *per annum* The definition of the expression 'tenure" shows that it includes every interest in land, whether rent paying or not, save and except an estate, and save and except the interest of a cultivating *raiyat* Therefore, a 'tenure' is more or less, a residuary interest not being an estate nor the interest of a cultivating *raiyat* On behalf of the defendant appellant, stress has been laid on the words 'paying rent' in the definition of a cultivating *raiyat*, and it has been contended that inasmuch as the defendant in this case pays rent which varies from year to year and may be less than one hundred rupees in some years, he must be considered to be a cultivating *raiyat* for those years in which he pays less than one hundred rupees per year In my opinion, the definition of a cultivating *raiyat* as given in S 4 should be read with S 41 Cess Act which shows the mode of payment of local cess by a holder of an estate by a holder of a tenure and by a cultivating *raiyat* We are not concerned in this case with the holder of an estate Sub s (2) of S 41, Cess Act shows the mode of payment of cess by the holder of a tenure When speaking of the deduction which the holder of a tenure is entitled to the expression used is 'less a deduction to be calculated at one half of the said rate for every rupee of the rent *payable* by him for such tenure' I have underlined (here italicized) the word 'payable' Similarly in the case of a cultivating *raiyat* the expression used is "calculated at the said rate upon the rent *payable* by him', I have again underlined (here italicized) the word "payable When the definition of a cultivating *raiyat* talks of 'paying rent not exceeding one hundred rupees per annum," it can only mean the rent payable for the land which the person cultivates The rent payable for the holding in our present case is Rs 525 2 6, it exceeds one hundred rupees In this view, it cannot be held that the defendant is a cultivating *raiyat* as per the definition given in the Cess Act

[4] There is another way of looking at the question The definition of a cultivating *raiya* does not envisage a case of varying rent, viz, case where rent paid exceeds one hundred rupee in some years and does not exceed that amoun in other years Such a case must, therefor come under the definition of a tenure whi includes every other interest except an est and the interest of a cultivating *raiyat* this view also the defendant is a tenure-hol for the purposes of the Cess Act

[5] There is, however a much simpler an to the contention raised on behalf of th fendant appellant which is provided by Cess Act The judgments on which the

[illegible] to the Cess Revalua- [illegible] valuation schedule, [illegible] that he was a tenure- [illegible] valuation of the holding [illegible] finally by the Cess Revalua- [illegible] only by the Com- [illegible] Board of Revenue. The civil [illegible] accept that [illegible] purposes of the Cess [illegible] Cess Act has been [illegible] decision of this Court, see [illegible] The latter is a [illegible] it was observed

[illegible] civil Court has juris- [illegible] the Cess Depart- [illegible] liability for cess [illegible] Section 93 is [illegible] the section [illegible] the amount on [illegible] subject [illegible] which the [illegible] Cess Department acted [illegible]

[illegible] contention of the de- [illegible] Cess Department was wrong [illegible] tenure-holder. Thus the de- [illegible] He should [illegible] Commissioner or the Board of [illegible] of the valuation. Not [illegible] ask the civil Court [illegible] for the purposes of [illegible] for the defendant [illegible] P. L. T. 613.[2] This [illegible] in 19 P. L. T. 532,[2] [illegible] that it does not in [illegible] decision of Ross J. in 90 I. [illegible] has also been placed on the [illegible] A. I. R. 1946 Pat. [illegible] however, of no help to the [illegible] was given in a case in [illegible] originally one holding of 155 [illegible] one hundred rupees: [illegible] valued as a tenure [illegible] the holding was [illegible] split up into four holdings with [illegible] of the landlord; and [illegible] rent in respect of each [illegible] than one hundred rupees. [illegible] it was held that the de- [illegible] cultivating raiyats within the [illegible] Cess Act. It was further observed [illegible] to the landlord not to consent [illegible] of the holding in which case [illegible] payable under clause (2) [illegible] landlord having given his con- [illegible] splitting up could not then refuse to [illegible] of the different holdings as [illegible] In the case before us nothing [illegible] cultivating raiyats [illegible] after the cess re-valuation, at [illegible] treated as a tenure-

holder for the purposes of the Cess Act. There has been no splitting up of the holding and the rent payable for it is the same as before. Therefore, the principles laid down in A. I. R. 1946 Pat. 200[4] cannot apply to this case. I am, therefore, of the view that S. 93 is bar to the plea of the defendant that cess is payable by him as a cultivating raiyat.

[6] For the reasons given above, I would dismiss the defendant's appeal, namely, Appeal No. 4 52 of 1945, but without costs. The plaintiff's appeal, namely, Appeal No. 59 of 1945, is allowed but without costs, and the decree of the Court of appeal below will be modified by allowing cess at the rate claimed by the plaintiff, namely, Rs. 35-15-9.

**Manohar Lall J.** —I agree. I wish to make a few observations about the argument raised on the application of certain sections of the Cess Act.

[8] The liability of the tenure-holder to pay cess is a statutory liability provided by S. 41 (1), Cess Act which determines the amount and also the rate. Similarly the liability of the cultivating raiyat is determined by sub-clause (3).

[9] Great confusion is apt to arise and very often arises when it is not clearly borne in mind that the definit ons of 'cultivating raiyat' and a 'tenure-holder with which we are ordinarily familiar in dealing with cases under the Tenancy Act are widely different from the definitions given to these two familiar expressions in the Cess Act. This has been repeatedly emphasised by various decisions of this Court.

[10] Is the defendant-appellant a tenure holder or a cultivating raiyat within the meaning of the Cess Act? It is admitted and indeed amply established that in the cess re-valuation proceeding this defendant has been described as a tenure-holder. The area of the land in his possession is given in the schedule and the annual rental which is payable by him as stated in his kabuliat i. e. Rs. 525-2-6 is also given under the appropriate heading towards the top. The contention of the appellant is that he cannot be treated as a tenure-holder for the years in suit as on the findings of fact arrived at by the Courts below he is liable to pay rent at less than Rs. 100 per annum for those years.

[11] The onus is on the appellant to prove that for the years in suit he should be treated as a cultivating raiyat. Now, has he discharged that onus? He says that he comes within the definition of a cultivating raiyat because for the years in suit he has been found to have cultivated only a part of the land comprised within the tenure so that he is liable only to pay rent at less than Rs. 100 per annum for each of the years in suit. In order to test the validity of this con-

tention the peculiar terms of the lease under which the appellant holds have to be examined This lease has been construed between the parties by the civil Court in a previous litigation There it has been correctly held that although the lessee is liable to pay rent over Rs 500, per annum as found in the document, but he is not liable to pay this entire sum if in any particular year he happens to cultivate a smaller area or rather if a smaller area only becomes culturable, and in that case he is to pay rent according to different rates for that portion of the land which he cultivates or becomes culturable if it falls within the superior kind from that which he cultivates if it falls within the inferior kind The reason for this peculiarity is that the land is situated near the river and is liable to be flooded with water every year and thus a part of it may become unculturable It was, therefore, provided that the defendant will be liable to pay rent at the rates mentioned in the document for the two kinds of land which have become culturable in the years in suit These being the terms of the tenancy it follows, in my opinion, that the rent payable by the defendant is always over Rs 500, per annum as has been fixed by the kabuliat although the rent which is actually paid by the lessee in and for a particular year may depend upon different circumstances In the present case, therefore, the answer to the question as to whether the defendant is a cultivating raiyat or a tenure holder depends not upon the actual area which may be found to have been culturable in the particular years in suit, but upon the actual area which this particular tenant has a right to cultivate or which he ordinarily is expected to cultivate provided that by the operation of the physical laws of nature so much land was actually culturable in the years in suit If the matter is looked at from this point of view, the contention of the defendant appears to me to be wholly untenable It may also be observed that to accept the contention of the appellant would mean that he would be a tenure holder in one year and a cultivating raiyat in another year although no change has occurred between him and his landlord as to the terms upon which he holds the lands comprised in the tenancy.

[12] I do not think the defendant seriously contended that the provisions of S 93, Cess Act did not prevent him from contesting the cess revaluation proceedings If that was his contention, it is completely answered by the cases of the Co[illegible]

rent Court and in a title suit between the parties that this defendant is liable to pay cess as a cultivating raiyat. It is indeed open to the defendant to urge that after the cess revaluation proceedings the situation has changed and that as between the landlord and himself he is now in possession of the same or a lesser area for which he is liable to pay rent at less than Rs 100 per annum This was the case in A I R 1946 Pat 200 [4] But in the present case the situation remains exactly the same as it was when the lands comprised in the tenure were leased out to the defendant No alteration has taken place and no fresh agreement has been arrived at between the parties In one of the judgments relied upon, all that was held was that the lease was given effect to and that upon its proper interpretation the defendant is liable to pay rent on the terms already stated by me In the second judgment relied upon, the Court did not decide the question but merely held that the defendant should pay cess as a cultivating raiyat That judgment cannot be treated as res judicata As the question does not appear to have been raised, no decision was arrived at by the Court—the Court merely decreed the rent for those years and added on the cess at half anna per rupee on the rental so decreed Now that the question has been raised, it has to be decided, and this decision, in my opinion, should be given on the interpretation of the kabuliat and on the interpretation of S 41 and the definition sections of the Cess Act I agree entirely with my learned brother in the view which he has taken

[13] I have come across many cases where the landlords realise a reduced rent from the tenants for some years after giving a mafi, they remit the interest due, but they never remit the cess which is payable by the tenant on the reasonable plea that they cannot remit the amount of cess as they have either already paid the same or are liable to pay it to the Collector Take a case where the defendant is a tenure-holder paying over Rs. 100 per annum but by some arrangement between him and the landlord he has been allowed a remission every year for some years or where he is entitled to remission on account of diluvion or temporary deterioration of the soil Can it be successfully urged that such a defendant ceases to be a tenure holder for those years within the meaning of the Cess Act on account of the conditions just mentioned? In my opinion, the answer is in the negative

[14] For these reasons, I am of opinion that the appellant is liable to pay cess as a tenure-holder as determined by my learned brother

G B *Decree modified.*

**A. I. R. (34) 1947 Patna 424** *[C. N. 140.]*

MEREDITH AND RAY JJ.

*Madhuban Ganda and others—Plaintiffs—Appellants* v. *Basanta Khetri—Defendant—Respondent.*

Appeal No. 164 of 1941, Decided on 17-9-1946, from appellate decree of Sub-Judge, Sambalpur, D/- 31-1-1941.

**(a) C. P. Tenancy Act (1 [I] of 1920), S. 11, proviso—"Inheritance"—Survivorship, if ruled out by use of word "inheritance."**

The effect of the use of the word "inheritance" in S. 11, together with the first proviso, manifestly rules out survivorship. The first proviso makes it apparent that the word is used advisedly and the proviso can only be read as meaning that no person shall take any interest on the death of an occupancy tenant during the lifetime of any ancestor who is a nearer heir: 13 A. I. R. 1926 Nag. 277 and 14 A. I. R. 1927 Nag. 272, *Dissent.* [Para 9]

**(b) C. P. Tenancy Act (1 [I] of 1920), S. 12—Transfer in contravention of section — Effect of sub-section (4)—Applicability of S. 13—C. P. Tenancy Act (1 [I] of 1920), S. 13 — T. P. Act (1882), S. 54.**

A transfer in contravention of S. 12 is merely voidable and can only be avoided by certain persons subject to certain conditions. But sub-s. (4) of S. 12 prevents registration, and the effect of this will clearly be that where the sale is for Rs. 100 or upwards it will be not only voidable as being in contravention of S. 12, but will also be wholly void under S. 54, T. P. Act for lack of registration. In such a case S. 13 will have no application, because there being no sale at all there has been no actual contravention of S. 12 but only an attempted one and the remedy, if any, will be in the civil Court. That means that S. 13 is only applicable to cases of transfers in contravention of S. 12 for a sum less than Rs. 100: 32 A. I. R. 1945 Nag. 119 and 16 A. I. R. 1929 Nag. 65, *Rel. on.* [Para 12]

**(c) C. P. Tenancy Act (1 [I] of 1920), S. 105 (c)—Applicability—Unregistered transfers for Rs. 100 or more.**

The bar in S. 105 (c) will only be applicable where the application would lie under S. 13, and therefore, can have no application in the case of unregistered transfers for Rs. 100 or more, and there is nothing in S. 105 which in such a case can bar the jurisdiction of the civil Court. [Para 13]

**(d) Transfer of Property Act (1882), S. 53A—Provisions of, if confer title on transferee — Provisions used in defence and not for attack.**

The provisions of S. 53A do not confer any title on the transferee. They can be used only in defence, and not for attack, and, moreover, they can be used in defence only against the transferor or any other person claiming under him. Thus, where in a suit for declaration of title to and recovery of possession over certain lands comprising an occupancy holding the plaintiffs are persons claiming under the transferor as his heirs, the provisions of S. 53A can be set up in defence against them, and though the part performance may have created no title in the transferee the plaintiffs can enforce no right in respect of the property on the ground of lack of registration. The equitable basis of the doctrine is that having sold the property to the transferee, having taken his money and having put him in possession, then even if the transfer is void the transferor in the interests of the prevention of fraud will not be heard to say so, and neither will any one claiming under him: 32 A. I. R. 1945 Nag. 119 and 16 A. I. R. 1929 Nag. 65, *Disting.* [Para 15]

('45-Com.) T. P. Act, S. 53A, N. 13, pts. 1 to 3.

**(e) C. P. Tenancy Act (1 [I] of 1920), Ss. 11 and 12—Transfer contravening S. 12 — Avoidance of—Want of legal necessity — Survivorship — Hindu law.**

A sale of an occupancy holding by a tenant may be voidable as contravening S. 12, but it cannot be avoided by his heirs as being without legal necessity, as the heirs do not take by survivorship. [Para 18]

**(f) Specific Relief Act (1877), S. 42—Sale of occupancy holding by tenant — Heirs' suit for declaration of title and possession — Right to possession barred under S. 53A, T. P. Act—Plaintiffs, if entitled to declaration — Transfer of Property Act (1882), S. 53A.**

Where the plaintiffs, who are the heirs of the tenant who sells his occupancy holding, institute a suit against the transferee for a declaration of title to and recovery of possession of the holding, but their right to possession is barred by the provisions of S. 53A, T. P. Act, the fact that they are claiming not independently of the tenant, but under him as his heirs, debars them from setting up any right to obtain a declaration that the sale is not binding upon them in face of the provisions of S. 53A, T. P. Act. [Para 19]

**(g) C. P. Tenancy Act (1 [I] of 1920), Sch. II, Art. 1—Applicability—Suit for possession of holding—Plaintiff claiming as tenant.**

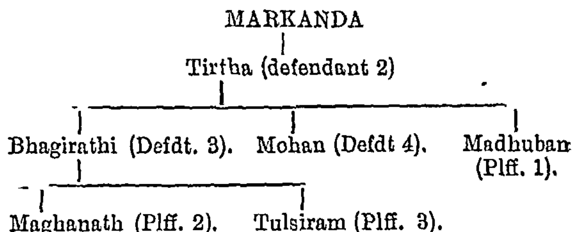
Article 1 cannot be held only to apply to suits under special provisions of the Act but applies to an ordinary suit in a civil Court such as a suit by persons claiming to be tenants for possession based on dispossession or exclusion from possession of the holding by the defendant. [Para 20]

*Cases referred:—*

1. ('45) 32 A. I. R. 1945 Nag. 119 : I. L. R. (1945) Nag. 433 : 221 I. C. 437.
2. ('29) 113 I. C. 110 : 16 A. I. R. 1929 Nag. 65.
3. ('26) 92 I. C. 916 : 13 A. I. R. 1926 Nag. 277.
4. ('27) 102 I. C. 711 : 14 A. I. R. 1927 Nag. 272.

*M. S. Rao*—for Appellants.
*B. N. Das*—for Respondent.

**Meredith J.**—This is a plaintiffs' second appeal against a judgment of reversal, dismissing their suit for a declaration of title to and recovery of possession over certain lands appertaining to or comprising an occupancy holding. The following genealogical table is relevant:




It was alleged that the occupancy holding comprising Schs. A and B of the plaint were the ancestral property of this family, but without the knowledge or consent of the plaintiffs, defendant 1 purchased the lands from defendants 2 to 4 by two unregistered sale deeds (Exs. C and D), dated 29-2-1936, one for Rs. 100 and the other for Rs. 300. The plaintiffs alleged that the sales were not for legal necessity, and

were in contravention of S. 12, Central Provinces Tenancy Act, 1920, under which the parties living in the Dharar tract are governed, and were also void for non-registration of the sale deeds.

[2] Defendant 1 contested the suit, alleging that the sales were for legal necessity, for payment of arrears of rent and family maintenance, and the sale deeds were valid and binding on the plaintiffs.

[3] The Munsif held that the lands belonged to Markanda and after his death devolved on Tirtha. The sales were for legal necessity of the family, and ever since the sales defendant 1 had been in possession, that is to say for four years, but the transfers were invalid both for lack of registration and as contravening the provisions of S. 12. Hence he decreed the suit.

[4] The learned Subordinate Judge held, first that the sales were for legal necessity. Secondly, that they were validated by part performance under S. 53A, Transfer of Property Act, which debars in such cases the transferor, or any person claiming under him, from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided for by the terms of the contract. This section was added to the Transfer of Property Act by S. 16, Transfer of Property Amendment Act (20 [XX] of 1929).

[5] Thirdly, the learned Subordinate Judge held that, having regard to the terms of S. 11, C. P. Tenancy Act, 1920, the plaintiffs could have no right to sue in the lifetime of Tirtha, defendant 2, since the law of survivorship was excluded; and, fourthly, he held that the suit was barred under the two years period of limitation provided by Art. 1 of Sch. 2, C. P. Tenancy Act. On these grounds he dismissed the suit.

[6] [illegible]

[7] [illegible]

tration under S. 54, Transfer of Property Act, there has been no transfer at all, and consequently, no contravention of S. 12, C. P. Tenancy Act, but only an attempted one. The position of the vendees would therefore be that of trespassers. Section 12, Tenancy Act could have no application, and a suit for ejectment would lie in a civil Court. In neither of these rulings is any reference made to S. 53A, Transfer of Property Act, or the doctrine of part performance.

[8] Before I proceed further to consider the contentions raised on the findings of the lower appellate Court, I think it advisable to examine the relevant provisions of the C. P. Tenancy Act, 1920. Section 11 of that Act is as follows:

> The interest of an occupancy tenant shall on his death pass by inheritance in accordance with his personal law:
>
> Provided that—
>
> (i) no person shall take any interest during the lifetime of any ancestor of such person in the male line of descent from the tenant;
>
> (ii) no collateral shall be entitled to inherit unless he is a male in a male line of ascent or descent and within seven degrees of kindred from the tenant.

[9] It is contended for the appellants that the provisions of this section do not mean that the law of survivorship is inapplicable. Reliance is placed on two decisions of the Nagpur J. C., Harali v. Harit (91 I. C. 916[3]) and Durlu v. Bhulal (102 I. C. 711[4]), where the opinion was expressed that the use of the word "inheritance" in S. 11 does not rule out survivorship. In neither case has that learned Judge considered the effect of proviso (i). With the greatest respect to him, it seems to me that the effect of the use of the word "inheritance" together with the proviso is definitely to rule out survivorship. The use of the word "inheritance" [illegible]

[illegible]

**A. I. R. (34) 1947 Patna 424** *[C. N. 140.]*

MEREDITH AND RAY JJ.

*Madhuban Ganda and others—Plaintiffs—Appellants v. Basanta Khetri—Defendant—Respondent.*

Appeal No. 164 of 1941, Decided on 17-9-1946, from appellate decree of Sub-Judge, Sambalpur, D/- 31-1-1941.

**(a) C. P. Tenancy Act (1 [I] of 1920), S. 11, proviso—"Inheritance"—Survivorship, if ruled out by use of word "inheritance."**

The effect of the use of the word "inheritance" in S. 11, together with the first proviso, manifestly rules out survivorship. The first proviso makes it apparent that the word is used advisedly and the proviso can only be read as meaning that no person shall take any interest on the death of an occupancy tenant during the lifetime of any ancestor who is a nearer heir: 13 A. I. R. 1926 Nag. 277 and 14 A. I. R. 1927 Nag. 272, *Dissent.* [Para 9]

**(b) *C. P. Tenancy Act (1 [I] of 1920)*, S. 12—Transfer in contravention of section — Effect of sub-section (4)—Applicability of S. 13—C. P. Tenancy Act (1 [I] of 1920), S. 13 — T. P. Act (1882), S. 54.**

A transfer in contravention of S. 12 is merely voidable and can only be avoided by certain persons subject to certain conditions. But sub-s. (4) of S. 12 prevents registration, and the effect of this will clearly be that where the sale is for Rs. 100 or upwards it will be not only voidable as being in contravention of S. 12, but will also be wholly void under S. 54, T. P. Act for lack of registration. In such a case S. 13 will have no application, because there being no sale at all there has been no actual contravention of S. 12 but only an attempted one and the remedy, if any, will be in the civil Court. That means that S. 13 is only applicable to cases of transfers in contravention of S. 12 for a sum less than Rs. 100: 32 A. I. R. 1945 Nag. 119 and 16 A. I. R. 1929 Nag. 65, *Rel. on.* [Para 12]

**(c) C. P. Tenancy Act (1 [I] of 1920), S. 105 (c)—Applicability—Unregistered transfers for Rs. 100 or more.**

The bar in S. 105 (c) will only be applicable where the application would lie under S. 13, and therefore, can have no application in the case of unregistered transfers for Rs. 100 or more, and there is nothing in S. 105 which in such a case can bar the jurisdiction of the civil Court. [Para 13]

**(d) Transfer of Property Act (1882), S. 53A—Provisions of, if confer title on transferee — Provisions used in defence and not for attack.**

The provisions of S. 53A do not confer any title on the transferee. They can be used only in defence, and not for attack, and, moreover, they can be used in defence only against the transferor or any other person claiming under him. Thus, where in a suit for declaration of title to and recovery of possession over certain lands comprising an occupancy holding the plaintiffs are persons claiming under the transferor as his heirs, the provisions of S. 53A can be set up in defence against them, and though the part performance may have created no title in the transferee the plaintiffs can enforce no right in respect of the property on the ground of lack of registration. The equitable basis of the doctrine is that having sold the property to the transferee, having taken his money and having put him in possession, then even if the transfer is void the transferor in the interests of the prevention of fraud will not be heard to say so, and neither will any one claiming under him: 32 A. I. R. 1945 Nag. 119 and 16 A. I. R. 1929 Nag. 65, *Disting.* [Para 15]

('45-Com.) T. P. Act, S. 53A, N. 13, pts. 1 to 3.

**(e) C. P. Tenancy Act (1 [I] of 1920), Ss. 11 and 12—Transfer contravening S. 12 — Avoidance of—Want of legal necessity — Survivorship — Hindu law.**

A sale of an occupancy holding by a tenant may be voidable as contravening S. 12, but it cannot be avoided by his heirs as being without legal necessity, as the heirs do not take by survivorship. [Para 18]

**(f) *Specific Relief Act (1877)*, S. 42—Sale of occupancy holding by tenant — Heirs' suit for declaration of title and possession — Right to possession barred under S. 53A, T. P. Act—Plaintiffs, if entitled to declaration — Transfer of Property Act (1882), S. 53A.**

Where the plaintiffs, who are the heirs of the tenant who sells his occupancy holding, institute a suit against the transferee for a declaration of title to and recovery of possession of the holding, but their right to possession is barred by the provisions of S. 53A, T. P. Act, the fact that they are claiming not independently of the tenant, but under him as his heirs, debars them from setting up any right to obtain a declaration that the sale is not binding upon them in face of the provisions of S. 53A, T. P. Act. [Para 19]

**(g) C. P. Tenancy Act (1 [I] of 1920), Sch. II, Art. 1—Applicability—Suit for possession of holding—Plaintiff claiming as tenant.**

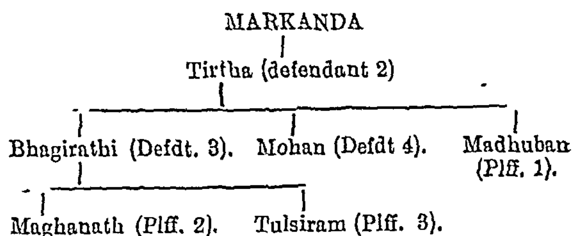
Article 1 cannot be held only to apply to suits under special provisions of the Act but applies to an ordinary suit in a civil Court such as a suit by persons claiming to be tenants for possession based on dispossession or exclusion from possession of the holding by the defendant. [Para 20]

*Cases referred:—*

1. ('45) 32 A. I. R. 1945 Nag. 119 : I. L. R. (1945) Nag. 433 : 221 I. C. 437.
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*M. S. Rao*—for Appellants.
*B. N. Das*—for Respondent.

**Meredith J.**—This is a plaintiffs' second appeal against a judgment of reversal, dismissing their suit for a declaration of title to and recovery of possession over certain lands appertaining to or comprising an occupancy holding. The following genealogical table is relevant:




It was alleged that the occupancy holding comprising Schs. A and B of the plaint were the ancestral property of this family, but without the knowledge or consent of the plaintiffs, defendant 1 purchased the lands from defendants 2 to 4 by two unregistered sale deeds (Exs. C and D), dated 29-2-1936, one for Rs. 100 and the other for Rs. 300. The plaintiffs alleged that the sales were not for legal necessity, and

were in contravention of S 12, Central Provinces Tenancy Act, 1920 under which the parties living in the Dhariar tract are governed and were also void for non registration of the sale deeds

[2] Defendant 1 contested the suit alleging that the sales were for legal necessity, for payment of arrears of rent and family maintenance, and the sale deeds were valid and binding on the plaintiffs.

[3] The Munsif held that the lands belonged to Markanda and after his death devolved on Tirtha The sales were for legal necessity of the family, and ever since the sales defendant 1 had been in possession, that is to say for four years, but the transfers were invalid both for lack of registration and as contravening the provisions of S 12 Hence he decreed the suit

[4] The learned Subordinate Judge held, first that the sales were for legal necessity Secondly, that they were validated by part performance under S 53A, Transfer of Property Act which debars in such cases the transferor, or any person claiming under him from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided for by the terms of the contract This section was added to the Transfer of Property Act by S 16 Transfer of Property Amendment Act (20 [XX] of 1929).

[5] Thirdly, the learned Subordinate Judge held that, having regard to the terms of S 11 C P Tenancy Act, 1920 the plaintiffs could have no right to sue in the lifetime of Tirtha, defendant 2, since the law of survivorship was excluded, and, fourthly, he held that the suit was barred under the two years period of limitation provided by Art 1 of Sch 2, C P Tenancy Act On these grounds he dismissed the suit

[6] With regard to the first finding, it is urged that the Munsif's decision is not clear, nd that the Subordinate Judge has merely ndorsed it without examining the evidence ndependently for himself The finding is not, herefore binding in second appeal It is un necessary to pronounce any opinion on this ontention for reasons that will presently be ome apparent

[7] With regard to the right to sue and the pplicability of S 53A, Transfer of Property ct the appellants rely upon *Chindhu v Dadu* A. I R 1945 Nag 119[1]) and *Maksudan Singh* *Darbargir* (113 I C 110[2]) in both of which it was held that where an occupancy holding purports to be transferred for more than Rs 100 by an unregistered sale deed, the sale deed being wholly void for lack of registration under S 54, Transfer of Property Act, there has been no transfer at all and consequently, no contravention of S 12, C P Tenancy Act, but only an attempted one The position of the vendees would, therefore, be that of trespassers Section 13 Tenancy Act could have no application, and a suit for ejectment would lie in a civil Court. In neither of these rulings is any reference made to S 53A, Transfer of Property Act or the doctrine of part performance

[8] Before I proceed further to consider the contentions raised on the findings of the lower appellate Court, I think it advisable to examine the relevant provisions of the C P Tenancy Act, 1920. Section 11 of that Act is as follows

> 'The interest of an occupancy tenant shall on his death pass by inheritance in accordance with his personal law
>
> Provided that—
>
> (i) no person shall take any interest during the lifetime of any ancestor of such person in the male line of descent from the tenant
>
> (ii) no collateral shall be entitled to inherit unless he is a male in a male line of ascent or descent and within seven degrees of kindred from the tenant

[9] It is contended for the appellants that the provisions of this section do not mean that the law of survivorship is inapplicable Reliance is placed on two decisions of Hallifax A J C, *Baiati* v *Surit* (92 I C 916[3]) and *Durlu* v *Shiolal* (102 I C 711[4]) where the opinion was expressed that the use of the word "inheritance' in S 11 does not rule out survivorship In neither case has that learned Judge considered the effect of provi o 1 With the greatest respect to him, it seems to me that the effect of the use of the word "inheritance" together with the proviso manifestly rules out survivorship The use of the word "inheritance", if that stood alone, might, as he thinks possible, be due to inadvertence, though that view seems to me difficult to accept having regard to the marked contrast between the wording of S 11 and S 5 Section 5 provides that 'The interest of an absolute occupancy tenant in his holding shall on his death pass by inheritance or survivorship in accordance with his personal law," whereas the words "or survivorship" are omitted from S 11 However that may be, proviso 1 makes it apparent that the word is used advisedly I can only read that proviso as meaning that no person shall take any interest on the death of an occupancy tenant during the lifetime of any ancestor who is a nearer heir, or applying it to the present case, on the death of Markanda neither defendant 3 nor defendant 4 nor tiffs 1, 2 and 3 could take any ing the lifetime of Tirtha

date the Public Prosecutor put in a petition stating that the investigating police officer was absent The pleader for the defence who appears to be a *Sanad* holder, put in a petition saying that it was necessary to examine the investigating police officer Mr B C Das then postponed the hearing till 26 7 1946 It is not very clear from the record why such a long adjournment was considered necessary in a case where the accused persons were indicted on a capital charge On 26 7 1946, Mr J N Mohanty was the Additional Sessions Judge Presumably Mr B C Das had been transferred and had made over charge as Additional Sessions Judge without finishing the case Mr J N Mohanty enquired of the accused persons if they wanted a *de novo* trial Their pleader did not press for a *de novo* trial, and Mr J N Mohanty examined only the investigating police officer and recorded the statements of the accused persons He heard arguments on 26 7 1946, and on 8 8 1946, he passed orders convicting the accused persons and sentencing them as stated above It would thus appear that Mr J N. Mohanty did not hear or record any part of the evidence in the case except the evidence of the investigating police officer. The question has therefore arisen if, in the circumstances mentioned above, Mr J N Mohanty was competent to pronounce judgment convicting and sentencing the accused persons, when most of the evidence in the case had been heard by another Sessions Judge In my opinion, the answer to the question must be in the negative Chapter 23, Criminal P C, deals with trials before High Courts and Courts of Session There is no provision in that Chapter which empowers a Sessions Judge to pronounce judgment on evidence recorded by another Judge It is a general principle that judgment must be delivered by the Judge who has heard the evidence There is an exception to this general rule provided by S 350 Criminal P C This section is very clear in its terms and applies in a case where any Magistrate, after having heard and recorded the whole or any part of the evidence in an enquiry or trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction The section says that in such a case the Magistrate so succeeding may act on the evidence recorded by his predecessor or partly by his predecessor and partly by himself, or he may re-summon the witnesses and recommence the enquiry or trial There are certain provisos to the section which need not be set out in detail It is important however, to note that one of the provisos says that the High Court, or in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if the High Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new enquiry or trial The substantive part of the section refers only to cases where one Magistrate is succeeded by another It does not refer to cases tried by Sessions Judges The reference to the High Court in proviso (b) does not, in any way, enlarge the scope of the substantive part of the section it merely gives the High Court power to interfere in cases where a conviction is based on the evidence not wholly recorded by the Magistrate before whom the conviction was held The same power is also given to the District Magistrate in cases tried by Magistrate subordinate to the District Magistrate There are a series of decisions of different High Courts which have held that S 350 applies only to Magistrates and not to Sessions Judges, and a Sessions Judge is not competent to pronounce judgment on evidence recorded by his predecessor, or on evidence partly recorded by his predecessor and partly by himself 21 W R Cr 47,[1] 23 W R Cr 59,[2] 3 Mad 112[3] 26 Bom 50,[4] 8 C L J 59[5] 35 ALL 63[6] and A I R 1927 Bom 161[7] The case in A I R 1927 Bom 161[7] related to a case tried in the High Court and was decided on different grounds, though it was observed there that

> "A Sessions Judge cannot act on evidence recorded by his predecessor and on a change of Judge the Sessions trial must commence *de novo* for S 350 does not apply to a case of that kind"

We asked learned counsel for the Crown whether there was any special law or rule in force in the Agency area which would enable the Sessions Judge to act on evidence recorded by his predecessor Learned counsel took time for the purpose, and was unable to place any such special

These modifications do not show that S 350, Criminal P C, has been modified for the Agency area

[4] The question has also been raised before us if the consent of the accused persons or the absence of a provision, similar to S 350 in the Chapter of the Code dealing with trials in the High Court and the Court of Session makes any difference In my opinion, it makes no difference in the legal position whether the accused persons consent or not Such consent will not

The annual rent of the suit land is Rs 15 6 6 including cesses The annual demand of the suit land is not Rs 19 4 4 as shown in the plaint

[11] The written statement of defendant 1, para 5

*The annual rent of the suit land is Rs 15 6 6 in*

[12] From the pleadings as set forth above, it is difficult to make out that the plaint contained an assertion that the tenure of the holding was *waram* The plaint para 3 purports to base the claim for an annual rent of Rs 18 4 4 on the defendant's agreement to pay as much in lieu of *rajabhagam* for certain years according to practice This assertion has no reference to the tenure of the tenancy at its inception It gives the plaintiff's reading of the agreement which is denied, if not expressly, at least by necessary implication in the written statements of the defendants which are to the effect that the annual demand of rent is and has always been Rs 15 6 6 including cesses Therefore, neither the pleading nor the *muchalika* supports the plaintiff's case that the tenure of the holding is *waram* and the *muchalika* does not effect any change by way of enhancement in the *waram* rate however much it may increase the annual demand on account of change of prices of the landlord's share of the crops

[13] The question that remains, therefore to be considered is whether the rent of the holding is money rent or *waram* rent The only evidence in the case with regard to the nature of the rent payable independently of Ex A is that a fixed money rent of Rs 14 11 6 plus cess used to be paid all along in respect of the holding and besides there is the statement of the *gumasta* of the plaintiff that

"cash rent is realised only in the Padhalo village in which the land in suit is situated Before 1930 the rent of the suit land was Rs 14 11 6

[14] Mr R K Ratho contends relying upon Ss 24 and 30 Madras Estates Land Act, 1908 that the rent of a *raiyat* cannot be enhanced except in the manner provided in S 30 Any agreement to the contrary, such as the terms of Ex A which has the effect of enhancing the *raiyat's* rent is illegal and cannot be given effect to He further contends that in view of the provisions of S 28 of the Act Rs 14 11 6 shall be presumed to be fair and equitable until the contrary is proved, and that S 29 is inapplicable to the case as it has to be presumed from the circumstances of uniform rate in money having been paid for a long time that the holding is cash paying In support of his contention as to the presumption he relies upon 7 Mad 365[2] and 42 Mad. 475.[3] These two decisions do support the proposition that long continued payment of rent in money at an unvarying rate in respect of a holding raises a presumption that the rent of the holding was agreed to be paid in money at its inception or that the *waram* rate had been converted into a money rent once and for all by a specific contract supported by good consideration 7 Mad 365[2] lays down that payment of rent in a particular form at a certain rate for a number of years is not only presumptive evidence of the existence of a contract to pay rent in that form or at that rate for those years but is also presumptive evidence that the parties have agreed that it is obligatory on the one party to pay and the other to receive rent in that form and at that rate so long as the relation of landlord and tenant may continue In 42 Mad 475[3] the majority of the Full Bench, where it was a case of enhancement of rent held that a Court can presume a contract to pay the higher rate and a legal origin and consideration therefor from such long continued payment of higher rate if that be the only evidence in the case to prove the rate payable but that if there be other evidence a Court cannot make any such presumption from such payment alone In (1882) 7 A C 633,[4] Lord Selbourne said

But an open and uninterrupted enjoyment from

not have been agreed upon as a permanent agreement either at the settlement or later by way of commutation

[16] The learned counsel for the respondent invokes the aid of S 27 and relies upon the cases in 29 M L J 362[5] 45 M L J 199[6] and 1920 M W N 15[7] But in my judgment, none of them can be of any help to him in view of the facts of this case Section 27 raises no presumption in his favour inasmuch as the plaintiff has failed to establish that the annual demand in ... year in suit ... the suit On ... raises the presumtion that Rs 14 11 6 is fair and equitable In 29 M L J 362[5] the money payment varied with the amount of produce The physical commodity was money and not grain as a matter of convenience The money rent was not fixed once for all but was altered every few years In these circumstances it was held that the fundamental agreement of wa... rat... ld not be taken as superseded by ... In 45 M L J 199[6] the te...

evidence to have been a *waram* tenure and it was held that the tenant was to prove that the *waram* rate had been permanently superseded. In [illegible] M. L. J. 15[4] it was held that mere proof of money payment will not establish permanent variation of *waram* if the rates of money payment were varied from time to time.

[17] It will be seen that in the present case it has not been proved that the tenure of the holding was a *waram* tenure. On the contrary, it has been proved that for all time since the inception of the holding, so far as it has been ascertained, there has always been payment of rent at a uniform rate in money. Added to this there is the evidence of prevalance of money rent in the village for a number of years and this according to the case in 32 Mad. 177[5] *forms an element in consideration of the question of usages.* Following the principles of lost grant, it has to be presumed that money rent of Rs. 14-11-6 was the cash rent payable in respect of the holding. The landlord has failed to prove that the holding still continued to be a *waram* tenure. Exhibit A, therefore, *containing a stipulation as it does of enhancement of rent contrary to the* provisions of law cannot be given effect to. The plaintiff's claim, therefore, so far as it is based upon rates stipulated in Ext. A, must fail.

[18] With regard to S. A. No. 25/45, it has been found by the learned lower appellate Court that *waram* rate was payable in respect of the holding is established by *muchalikas* of 1893, 1899 1904, 1234F and 1255F. The learned trial Court dismissed these *muchalikas* on the observation that they were not very modern to be accepted as proof of the prevailing rate. This may be so, but as correctly observed by the learned lower appellate Court, they do prove that the tenure of the holding was originally *waram*. In that case it has to be established by the tenant that the *waram* rate has been converted. The tenants rely upon a series of rent receipts Exs. B to B (12) bearing testimony of payment of rent in money, but these receipts, however, do not establish that the rents paid were at a uniform rate. There is no doubt the evidence of some of the plaintiff's witnesses who state about the payment of cash rent in lieu of produce rent. The principle applicable on the analogy of lost grant principle, to a case in which there has been long payment of rent in cash at a uniform rate is *not applicable* to the facts of this case in view of the findings arrived at by the lower appellate Court. As laid down in 45 M. L. J. 199,[6] evidence of money payment for several years at varying rates under specific contracts in terms of *pattas* for a stated period, does not warrant the inference that the *waram* system was permanently given up.

[19] Mr. Baiko appearing for the appellant promised to supply translations of the rent receipts so that we could be in a position to see if the rates mentioned there were uniform. He has not done so, and, according to the lower appellate Court, it is also not possible to come to a conclusion that the cash rental paid was at varying rates. Under the circumstances, the matter requires consideration. If it is found that uniform rates of rent in cash have been paid for a large number of years continuously not as temporary lapses of the *waram* system by agreements entered into from time to time by varying rates, the presumption of conversion of *waram* into cash system will no doubt arise in favour of the tenure of the holding. Under the circumstances, I think, the learned lower appellate Court's order directing a remand of the suit is correct. As laid down in A. I. R. 1925 Mad. 464[7] where in a suit for recovery of rent the tenant disputes the amount claimed the Collector can determine what the proper rate is. I would, therefore, uphold the order of remand, and direct the trial Court to, first of all, determine if money rent has been paid continously for a number of years on uniform rates; then there will be a presumption of conversion of *waram* into cash rent by specific agreement, failing that it will be proper for the trial Court to determine what is fair and equitable rate to be paid in respect of the holding.

[20] In the result, S. A. No. 5 of 1941 is allowed and the judgment of the lower appellate Court is set aside and that of the trial Court restored. S. A. No. 25/45 is dismissed with costs.

**Meredith J.**—I agree.

D.H. *Order accordingly.*

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*[Case No. 143.]*

**A. I. R. (34) 1947 Patna 434**

MANOHAR LALL AG. C. J. AND DAS J.

*Mt Sheopati Kuer — Appellant v. Ramakant Dikshit and others—Respondents.*

Appeal No 42 of 1944. Decided on 20-9-1946, from original decree of Dist. Judge Saran, D/- 1 2-1944.

(a) Succession Act (1925), S. 283 (1) (c)—P[illegible] claiming *interest in* estate of deceased — C[illegible]ation to—Power of District Judge to issue if discretiona[illegible] — Daughter of Hindu testator entitled to su[illegible] on his death, if entitled to citation — Succes[illegible] Act (1925), S. 263, Illus. (ii).

Per *Das J.* — Any interest, however slight and e[illegible] the bare possibility of an interest, is sufficient *to en*tit[illegible] a party to oppose a testamentary paper. Hence, daughter of the testator, who was the *person* entitled [illegible] succeed under *Hindu* law on the death of the test[illegible]tor, is entitled *to citation* and she is a person *ought to have been cited*" as contemplated by Illus.

of S 263 3 I C 178 (Cal) 3 A I R 1916 Cal 623 and 16 A I R 1929 Pat 365, *Ref* [Para 7]

(b) Succession Act (1925) S 263 Illus (ii) — Scope — Illus (ii) is not confined to cases of com

(c) Succession Act (1925) S 263 Expl cl (a)—Just cause—Defect of substance—Absence of citation on minor daughter of testator where her natural guardian appeared and contested grant — Defect not of substance and therefore not a just cause for revocation

*A defect arising out of the absence of citation on a minor daughter of the testator who was a person* entitled to special citation where her natural guardian

[Para 23]

(d) Succession Act (1925) S 263—Revocation — Mere delay in applying for revocation if bars revocation

3 A I R 1916 Cal 623 *Ref* [Para 24]

*Cases referred* —


1 (09) 10 C L J 263 3 I C 178 Brindaban Chunder v Sureswar Shaha

2 (15) 19 C W N 882 3 A I R 1916 Cal 623 30 I C 161 21 C L J 557 Shyama Charan v Prafulla Sundari

... C 451 Ram

... 39, Digambar

... v Mara

6 (27) 31 C W N 160 14 A I R 1927 Cal 207 ... Mabbert

7 ... 2 7 Pat ... Mt Kala

8 (31) 35 C W N 387 18 A I R 1931 Cal 713 135 I C 282 Haimabati Mitra v Kunja Mohan Das

9 (24) 40 C L J 297 12 A I R 1925 Cal 223 84 I C 689 Akhileswari Dasi v Haricharan Mirdha

10 (08) 12 C W N 6 Shoroshibala Debi v Anandamayee Deb

11 (15) 19 C W N 747 2 A I R 1915 Cal 393 28 I C 574, Dwijendra Nath v Golok Nath Sarma

12 (32) 36 C W N 1010 20 A I R 1933 Cal 74 142 I C 69 Charubala D v Menaka Sundari De

13 (29) 18 A I R 1929 Pat 385 122 I C 537, Iriya Nath v Sarla Bala Debi

14 (91) 18 Cal 45 Nistariny Debya v Brahmamoyi Debya

15 (31) 35 C W N 53 18 A I R 1931 Cal 497 131 I C 806 Sidafal Kanu v Sodari Hajam

16 (20) 11 P L T 353 17 A I R 1930 Pat 469 125 I C 774 Bibhuti Prasad v Mt Pan Kuer

17 (22) 1 Pat 86 9 A I R 1922 Pat 406 69 I C 611 Kanhai Raut v Jogendra Raut

18 (10) 14 C W N 1008 7 I C 740 Kunja Lal v Kailash Chandra

19 (15) 21 C L J 555 2 A I R 1915 Cal 706 30 I C 12 Nalini Sundari v Bejoy Kumar Roy

20 (15) 19 C W N 366 2 A I R 1915 Cal 419 42 Cal 480 28 I C 886 Monorama Chowdhrani v Shiva Sundari

21 (31) 35 C W N 563 18 A I R 1931 Cal 717 131 I C 286, Aswini Kumar v Sukhabasan Chakravarty

22 (03) 30 I A 182 30 Cal 1021 8 Sar 512 (P C), *Mt Bibi Walian v Baakey Behari Persad*


*Pitambar Jha and K P Sukul*—for Appellant

*Ram Pratap Singh L K Jha and Ganesh Sharma* —for Respondents

**Das J.** — This is an appeal from a decision of the learned District Judge of Saran dated 1 2 1914, by which he has refused the appellant's application for revocation of the grant of letters of administration made in favour of some of the respondents on 30 4 1900 in respect of the estate of one Harihar Dikshit The main question which arises for decision is if there is just cause for revoking the grant of letters of administration as contemplated by S 263 Succession Act

[2] It is necessary to state briefly the facts out of which the appeal has arisen The appellant is the daughter of Pandit Harihar Dikshit by his wife Mt Rajbansi Kuer It appears that Harihar Dikshit first made a will on 9 9 1898 in favour of his wife Mt Rajbansi Kuer and his daughter in law Mt Dhanrajo Kuer who was the widow of a pre deceased son of Harihar Dikshit Harihar Dikshit subsequently revoked this will and executed another will on 20 9 1899 at Benares where he had gone at the time of his last illness This will was in favour of his own brother Ram Sewak Dikshit, father of some

filed an application for probate which was numbered as case No [illegible] Ram Sewak Dikshit also applied for probate of the [illegible] will, and his case was numbered [illegible] Mt Rajbansi Kuer, mother of the appellant, contested the application of Ram Sewak Dikshit The two cases were [illegible] ed and tried [illegible] The Court [illegible] application of [illegible] of administration [illegible]

annexed to some of the respondents on 30-4-1900, Ramsewak having died during the pendency of the probate proceedings. There were two appeals to the High Court of Judicature at Fort William in Bengal, the High Court which had jurisdiction at the time, and the appeals were dismissed. The grant in favour of some of the respondents was upheld.

[3] It is not in dispute that the appellant is the daughter of Harihar Dikshit. The main grounds on which the appellant founded her application for revocation are mentioned in paras. 12 (vi) and 12 (vii) of her application which read as follows:

"(vi) That in the petition for probate Ram Sewak Dikshit did not mention the existence of the petitioner, then a mere minor, and no general or special citations were issued or served on the petitioner or anybody in the locality.

(vii) That no guardian of the petitioner was appointed in that proceeding and it was illegal and defective in substance from the beginning to the end."

It was also alleged by the appellant that both wills dated 9-9-1898 and 20-9-1898, were forged and fabricated.

[4] The respondents denied the allegations made by the appellant and they alleged that citations were issued and served on all persons which were required by law to be served, and they further alleged that Musammat Rajbansi Kuer, mother and natural guardian of the appellant, keenly contested the application for probate right up to the High Court, and there was no fraud, illegality or irregularity at any stage of the proceeding. They also alleged that both Musammat Rajbansi Kuer and the appellant had acquiesced in the grant and had derived benefit in accordance with the directions given in the will, and the appellant knew of the grant long before 1938, and that the application has been filed after long delay at the instance of the enemies of the respondents.

[5] The learned District Judge framed several issues of which issues 4 and 5 were only pressed and decided by the learned District Judge. Issue No. 4 raised the question if the grant of probate (the grant was really one of letters of administration) in Case No. 177 of 1898 was illegal; in other words, this issue raised the question if the proceedings to obtain the grant were defective in substance, which would be a just cause for revoking the grant. Issue 5 was a general issue raising the question as to what relief, if any, the appellant was entitled to. On a consideration of the evidence given in the case, the learned District Judge came to the following finding:

"I would come to the conclusion that all the formalities of the law had been complied with and that there was no concealment of the existence of the applicant from the Court during the probate proceedings which cannot be held to have been defective in any manner. The witness, Ramakant Dikshit, for the objectors deposed that notices had in fact been issued and served upon the applicant through her mother guardian, and I see no reason to doubt this evidence. The case was much contested and fought up to the Calcutta High Court and I do not think that there is any room for holding that fraud of any kind had been committed."

The learned District Judge further found that the appellant knew of the will long before 1938, and that she had failed to give any satisfactory explanation of the long delay in filing the application for revocation. There is no finding on the question of acquiescence, though the learned District Judge has stated that the appellant's mother Raj Bansi Kuer had instituted a suit for maintenance against some of the respondents in the year 1929 for recovery of possession of certain lands on the allegation that the lands had been given to her for maintenance, on the basis of the will and that the sons of the appellant did *pairvi* for Rajbansi Kuer in that suit. The learned District Judge has relied on this circumstance for his finding that the appellant knew of the grant before 1938. The learned District Judge has refused the application for revocation on his main finding that there was no defect of substance in the proceedings which resulted in the grant of letters of administration.

[6] Learned counsel for the appellant has addressed us on questions of fact as well as of law. I shall deal with the question of fact first, and then consider the questions of law which would arise on the facts found. The foremost question of fact in this case is if citation was issued and had been served on the appellant in the proceeding which resulted in the grant of letters of administration to the respondents. It is admitted that at the time of the proceedings in 1900 the appellant was an infant of about 12 or 13 years of age or even less. Her mother, therefore, was her natural guardian. If any citation had been issued and served on the appellant, it must have been through her natural guardian. The learned District Judge appears to have relied on the evidence of Ramakant Dikshit, one of the respondents, who said as follows:

"Notice has been issued and served on Sheopati Kuer in the probate case. Sheopati was then 12 or 13 years of age. Her guardian was her mother, Rajbansi Kuer. The notice had been served through her guardian. Rajabansi Kuer had given the name of Sheopati Kuer in her application for probate."

It is to be noted that the papers of the probate case have been destroyed according to the rules of destruction, and service reports etc. are not available now. Learned counsel for the appellant has, however, drawn our attention to the copy of the judgment of the High Court (Ex. B), which shows that the appellant was not made a party to the proceeding. We have looked into the paper-books of the appeals which were heard

in the Calcutta High Court, the paper books of all Calcutta cases relating to this Court having been sent here. The petitions for probate, the judgment of the Subordinate Judge, the decree and the memoranda of appeals as printed in the paper books all show that the appellant was not made a party to the proceedings, though the name of the petitioner is mentioned in the body of the petition filed by Musammat Rajbansi Kuer In these circumstances, I do not think that reliance can be placed on the evidence of Ramakant Dikshit It is more than probable that no citation was issued or served on the present appellant separately from her mother The mother no doubt had appeared and contested the application filed by Ram Sewak Dikshit Therefore, on the question of fact if citation had issued and had been served on the appellant, the finding should be in favour of the appellant, namely, that no special citation had issued or had beed served on the appellant through her natural guardian, though her natural guardian, namely, the mother, had appeared and contested the application

[7] I now take up the questions of law which arise on the aforesaid finding of fact Learned counsel for the appellant has placed great reliance on illus 2 of S. 263, Succession Act, 1925 which corresponds to S 50 of Act 5 of 1881 The substantive part of the section says that the grant of probate or letters of administration may be revoked or annulled for just cause There is an explanation to the section which says that just cause shall be deemed to exist where, among other things, the proceedings to obtain the grant were defective in substance There is no doubt, in my mind, that once it is found that the proceedings to obtain the grant were defective in substance, it must be held that just cause exists and the grant of letters of administration may be revoked The words of the explanation are imperative in character and say that just cause shall be deemed to exist where the proceedings to obtain he grant were defective in substance Illustra on 2 is merely an instance of the practical plication of the explanation the real point decision is if the proceedings to obtain the nt were, in the particular case in question, ctive in substance It is necessary, however, ear the ground for a decision of this main by disposing of certain other subsidiary connected with it A question has been before us if the appellant was entitled to in the life time of her mother, who was on entitled to succeed under Hindu law eath of the testator Harihar Dikshit counsel for the respondents has invited ion to S 283, Succession Act (corresponding to S 69 of Act 5 of 1881), and has contended that it was merely disc the District Judge to issue citation all persons claiming an interest in the deceased to come and see the before the grant of letters of admin is, however, well established now tha terest, however slight and even the b bility of an interest, is sufficient to party to oppose a testamentary pape been held in several decisions that alt reversioner under the Hindu law has no alienable interest in the property left b deceased, still he has substantial interest protection or devolution of the estate, a such, is entitled to appeal and be heard probate proceeding see 10 C L J 263[1] 19 C W 882[2] and A I R 1929 Pat 365[3] There can, th fore, be no doubt that the appellant, who w the daughter of the testator, was entitled citation, and she was a person "who ought t have been cited" as contemplated by illustra tion 2 of S 263

[8] Learned counsel for the respondents has then contended that there is a distinction between compulsory citation and discretionary citation He has relied on the well known Bombay decision in 9 I C 354[4] in which it has been held that where the compulsory citation has beed omitted, the grant of letters of adminis tration would be defective on the face of it, but where the citation is discretionary, the Court can not say that mere absence of the citation invali dates the grant But Illus 2 of S 263 refers not only to cases where it is imperative on the Court to issue a special citation, but it refers to all cases where the grant is made without citing the parties who ought, in the opinion of the Court, to have been cited This is the view which has been expressed in 2 C.W N 100[5] The position has been expressed in explained in 31 C. W N 160[6] and I can do no better than quote the observations made there

"On behalf of the respondents it has been urged that S 250 Succession Act gives a discretion to the Judge in the matter of issuing citation, and the only case where such omission amounts to a just cause for revocation under S 234 of the Act is a case of an omission to issue a citation such as is mentioned in S 193 or S 199 of the Act and is compulsory, and in support of this contention reliance has been placed upon the case in 13 Bom L R 384 This last mentioned case, which related to a will and was under the Probate and Administration Act, it is true, lays down a distinction between compulsory citations and discretionary citations on reference to S 15 and S 69 of the Act, but I doubt very much whether the learned Judges intended to lay it down that it is compulsory citations which would come within [illegible] to S 50 of the Act as has been contended for before [illegible] judgment in that case to my mind is not in [illegible] with the view that they held that both classes [illegible] tions come within the illustration, but that [illegible] whether the grant should be revol[illegible] depend upon the circumstan[illegible] of compulsory [illegible]

sidered, while in the case of discretionary citations other considerations have to be taken into account. This precise contention which the respondent has now put forward was urged in this Court in 2 C.W.N. 100[5] and was not accepted as well-founded (*see* the judgment of Banerjee J., in that case) and I agree with what was said by the learned Judge in his judgment in that case."

I am, therefore, of the view that illustration (ii) of S. 263 is not confined to cases of compulsory citation only. The position, therefore, comes to this that the appellant, as a daughter of the testator, ought to have been cited, but no special citation was issued or served on her, though the *natural guardian, viz;* her *mother appeared and* contested the case.

[9] Now, comes the main question whether in the circumstances mentioned above, there is just cause for revoking the grant. It has been very strenuously contended on behalf of the appellant that absence of citation on her at once brings her case within illustration (ii) of the section and it must be held that the proceedings to obtain the grant were defective in substance, once that is held, the grant must be revoked. Learned counsel for the appellant has placed very great reliance on the decision of their Lordships of the Judicial Committee in 55 I A. 18[7] and also on 35 C. W. N. 387.[8] I shall presently consider these decisions in detail. On behalf of the respondents, it has been contended with equal vehemence that the mother was the natural guardian of the appellant at the time; she appeared in the case and contested the grant right up to the High Court; there is nothing in the record to show that she acted injuriously to the appellant or that her interest was adverse to that of the minor; therefore, she ffectively represented the appellant in the probate roceedings, and *it cannot be said that the defect* rising out of the absence of citation was a defect of substance, which alone can be a ground for revocation. Apart from authority, which I shall presently discuss and which also (in my opinion) is in favour of the view I am about to express, I fail to see how a proceeding can be said to be defective in substance, when the natural guardian of the minor has appeared and has contested the grant right up to the High Court. The position, *no doubt, will be different if the natural* guardian is under the influence of the propounder of the will or puts up a nominal contest or does not appear at all or her interest is adverse to that of the minor. In those and other like circumstances, the absence of citation on a person, who ought to have been cited, will no doubt be a defect of substance which shall be deemed to be a just cause as is mentioned in the explanation to S. 263. In a case, however, where the person, who could under the law appear on behalf of the minor, did appear and contest the grant as hard as she could, right up to this Court, it cannot be said that the proceedings were defective in substance, and the grant should be revoked.

[10] As to authority, there are two lines of decisions : one in which the absence of citation has been considered to be a defect of substance and the grant has been revoked, and the other where the absence of citation by itself has not been considered to be a defect of substance and the grant has not been revoked. I take up first the decisions which have held that absence of citation is a defect of substance. The earliest decision is 2 C. W. N. 100.[5] This was a case in which no citation was issued on two minor sons of the testator. The finding was that no one was served except the co-executors and the grant of probate was not contested, which would be regarded in England as a grant of probate in common form only. The judgment of Bannerjee J. one of the Judges who decided the case, makes the position clear. He says as follows :

"It appears clear on the evidence that the petitioners, the minor sons of the alleged testator, had been living under the guardianship of Mr. Dias, one of the executors, who was the applicant for probate, and so it was clearly necessary that the minors should have been represented in the probate proceedings by some one appointed as guardian ad litem whose interests were not adverse, as those of the applicant for probate were, to the interests of the minors."

That decision, therefore, is no authority for the proposition that mere absence of citation must in all cases be held to be a defect of substance.

[11] The next decision, which has been brought to our notice, is 40 C. L. J. 297.[9] This was a case in which no notice was served on the infant daughters of the testator. It was observed in that case that notices, *directed to the infants*, were taken to the house of their father and as the girls could not be found, the notices were affixed to the thatch : no appearance was entered on their behalf, and the letters of administration were granted exparte. This case also is no authority for the view that absence of citation is a defect of substance, even when the natural guardian has appeared and contested the case on behalf of the minor.

[12] The earlier decision in 12 C. W. N. 6[10] is also similar in nature. In this case an application for probate was made by two widows of the testator and citation was issued upon the infant daughter of one of them as represented by her mother (one of the applicants for probate) and in those circumstances it was held that the proper course for the applicant for probate was to have somebody appointed by the Court to act

as guardian of the infant daughter or to take out citation against her represented by her next friend, or by an officer of the Court who could have no interest adverse to the infant daughter The reason for the decision was that the mother (one of the applicants for probate) could not represent both her interest and the interest of her daughter

[13] The case in 19 C W N 747[11] was a case in which both the daughter and the mother were minors It was therefore useless to serve the notice on the minor's mother because the latter was also a minor and could not protect the interest of her minor daughters It was observed there that the object of the issue of the citation is that all persons, whose interests are or may be adversely affected by the decree of the Probate Court shall have notice of the proceedings and an opportunity, should they choose to avail themselves of it of intervening for the protection of their interests It was held in that case that this purpose was not achieved merely by issue of citations to two infants

[14] In 36 C W N 1910[12] the application for probate was made by a brother The testator had left a widow, a widowed sister and three infant daughters Citation was issued on the widow and the widowed sister There was no contest, and, on the other hand there was a petition purporting to have been made by the widow and the widowed sister consenting to the grant It was found that the three infant daugh ers of the testator were residing with their nother in the house of Ramgobind In these cir umstances it was held that the failure to men on the existence of the daughters and to have em represented and cited was a defect suffi nt to revoke the probate

15] In A I R 1929 Pat 385[13] which is a sion of this Court the son of a sister of the ator applied for revocation. It was held that as entitled to citation But as he was aware e probate proceedings and stood by, he was ntitled to apply for revocation This case is help to the appellant

I now take up the two decisions on which l counsel for the appellant has placed the t reliance In 55 I A 18[7] their Lord ame to the finding that even if some kind ality was gone through on the occasion ervice of notice is said to have been it was not such as would give to the lleged to have been served an oppor her to oppose the grant of probate or the will to be proved in her presence ular circumstances of the case the ser y, was of no greater effect in law than rvice on an infant of tender years e where Ramanandi Kuer the minor

daughter of the testator, applied for revocat and as stated above the finding was that service of notice on her mother was defecti and that the person alleged to have been serve with notice had no opportunity either to oppo the grant or require the will to be proved i her presence The mother Thakurani Kuer di not appear, and the order for grant of probate was made in her absence It was further found that Thakurani was living as a dependent female member of the family of which the actual head was the propounder of the will In those circumstances it was observed that if all the circumstances were fully placed before the Court Thakurani would not have been appointed guardian ad litem of her daughter Their Lordships then observed

> If citations were not served i e properly and effectively served on Thakurani the daughter is entitled to ask that the probate which was obtained in her absence should be recalled and the executor or his representative called upon to prove the will in the presence.

It would be seen from what I have stated above that their Lordships were dealing with a case which is essentially different from the case under our consideration and the principles laid down therein are not applicable to a case where the natural guardian whose interest is not adverse to that of the minor and who was not in any way under the influence of the propounder of the will appears and contests the application before the grant is made Learned counsel for the appellant has characterised the will as an inofficious and unnatural testament in that it does not mention the daughter and makes no provision for her The will states why the properties were given to the brother and what provision was made for the maintenance of the widow The fact that there was a daughter was known to the Probate Court, having been mentioned in the mother's application These are matters which were for consideration of the Court of Probate in which the contest was made The present question for consideration is if there was a defect of substance in the proceeding which resulted in the grant

[17] The decision in 35 C W N 387[8] follows the decision mentioned above on very similar facts The daughter applied for revocation 32 years after her father's death At the time of her father's death she was a minor living with her mother who again lived in the same mess with and under the protection of the propounder of the will The mother either for self or as guardian of her infant daughter did not enter any caveat, and the matter was treated as a non contentious proceeding These facts are sufficient to distinguish this decision from the case before us

[18] I now turn to those decisions where absence of citation, in certain circumstances, has not been held to be a defect of substance. The earliest decision is 18 Cal. 45.[14] This was a case where the testator died leaving a minor widow and his mother. The mother applied for probate: the usual citations were issued, and the paternal uncle of the minor widow entered a caveat representing that the minor was living under his care and was the heiress at-law and that the will was a forgery. It was contended on behalf of the minor widow that as she had not appeared nor had she been specially cited to appear in the probate proceeding, there was just cause for revocation of probate within the meaning of S. 50, Probate Act. Dealing with this contention their Lordships observed as follows :

"Let us examine what the facts are. Kali Prasad Tripati, paternal-uncle of the minor, clearly had notice of the proceedings. It is admitted by the minor's mother, who now represents her as her guardian, that he is not on bad terms with the minor, and that the minor has been living in the same house with him. Kali Prasad had no interest whatever in opposing the grant of probate otherwise than as representing the minor. He did oppose the grant of probate, expressly representing that the minor was living under his care and was the heiress-at-law of the alleged testator, and his opposition was successful in the first Court, though the Appellate Court took a different view of the case. And both the Courts regarded him as acting on behalf of the minor. These being the facts of the case and the allegation of fraud and collusion between Kali Prasad and the opposite side being now given up, the only conclusion that we can come to is that the persons under whose care the minor has been living, and who are interested on her behalf, were fully aware of the previous proceedings, and that the party who entered appearance and opposed the grant, though nominally appearing on his own behalf, did really appear on behalf of the minor.

We do not, therefore, think that any just ground has been made out for reopening the proceedings."

[19] The principle laid down in the aforesaid decision was approved in 35 C. W. N. 58[15] and in 11 P. L. T. 353,[16] though in the latter case the decision rested on the question if the applicant had interest in the estate left by the testator. In 1 Pat. 86[17] it has been held that where special citation is not issued upon a person entitled to it, a grant of letters of administration is nevertheless binding on him if he had knowledge of the application for the grant and had an opportunity of intervening.

[20] In 31 C. W. N. 160[6] the sister of the testatrix applied for revocation on the ground, *inter alia*, that two minor sons of a deceased brother of the testatrix had not received separate citation and that their mother was not competent to represent them, as she was not a properly constituted guardian. Regarding this ground it was observed as follows:

"She (the mother) appears to have taken part in the proceedings and put in a petition stating the shares which her sons would, according to her, be entitled to. She does not appear to have done anything injurious to the interest of her sons and nothing has been shown to us which may suggest that their interest was not properly looked after. It must, under the circumstances, be held, despite the absence of a formal order appointing her guardian ad litem, on behalf of the infants that the infants were effectively represented by her in the proceedings."

[21] There are other decisions where the question of delay and acquiescence or subsequent ratification has been considered: see, for example, 14 C. W. N. 1068;[18] 21 C. L. J 555;[19] 19 C W. N. 866[20] and 35 C. W. N. 568.[21] The last decision is of some importance as it lays down that delay in applying for revocation of probate is fatal only when from circumstances attendant upon the delay an inference of waiver can reasonably be made; mere delay, without more is no bar to revocation. I do not wish to examine this question of delay at any greater length, because there is no finding on the question of acquiescence or waiver against the appellant. As has been observed in 21 C. L. J. 557,[3] there may be a distinction between a case where the acquiescence alleged occurs while the act acquiesced in is in progress, and another where the acquiescence takes place after the act has been completed. In the former case the acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it; in the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined obviously on very different legal considerations. It has also been observed in certain cases that a person can be barred of his remedy on the ground of waiver, only when at the time of the alleged waiver he has been shown to have been fully cognizant of his right on the facts of the case. In the case before us all that has been found is that the appellant knew of the probate proceedings long before 1938. I do not, therefore, think that this is a case in which mere delay would bar the remedy of the appellant, in the absence of any finding of acquiescence or waiver.

[22] As a result of a consideration of the authorities mentioned above, I have come to the conclusion that though the appellant did not receive special citation in the probate proceeding which resulted in the grant of letters of administration to the respondents, there is no just cause for revocation in the present case, inasmuch as there was no defect of substance in the said proceeding. The mother of the appellant was her natural guardian. She appeared and contested the grant right up to the High Court. She did not act injuriously to the interest of the appellant, and she was not under the influence of

...the propounder of the will or any one connected with him For all practical purposes, she represented her minor daughter as effectively as she represented herself. The existence of the daughter was not concealed from the probate Court, inasmuch as her existence was mentioned in the very petition which the mother had filed In coming to the conclusion at which I have arrived, I have not been unmindful of the fact that the mother herself had propounded a will, the genuineness of that will was not however, accepted by the Court of Probate As far as the will propounded by Ramsewak Dikshit is concerned, she contested the grant as best as she could, right up to this Court, and all possible objections were taken to it The contest was not a mere nominal contest, and there is no proof that the mother of the appellant was colluding with the propounder of the will or was under the latter's influence The paper books of the appeals heard in the Calcutta High Court show that a large number of witnesses were examined on behalf of both parties, including the mother of the appellant and the doctor who treated Harihar Dikshit before his death In these circumstances, it cannot be said that the contest was a formal contest or that Rajbansi Kuer was in any way influenced by the propounder of the will There was, therefore, no defect of substance in the proceedings which resulted in the grant

[23] For the reasons given above, I would hold that there is no just cause for revocation in the present case I must add that if we had found that there was just cause for revocation, we would have revoked the grant and sent the case back to the District Judge for giving the respondents an opportunity of proving the will in solemn form in presence of the appellant There would undoubtedly be great difficulty in proving the will after the lapse of about 49 years, but as observed by their Lordships of the Judicial Committee in 55 I A 18,[7] much of the difficulty could have been avoided by prudent action on the part of the propounder. That difficulty should not have stood in the way of revocation of the grant

In view of my finding, however, that there is no just cause for revocation in the present case, the appeal fails and must be dismissed In the circumstances of the case, there would be no order for costs

Manohar Lall, Ag C J. — I have read the elaborate judgment prepared by my learned brother I only wish to add a few words to show why I agree with his conclusion I do not propose to discuss the numerous cases which have been exhaustively reviewed by my learned brother as I am of the opinion that the same conclusion can be reached by examining the general principle which has been illustrated in the leading Privy Council case in 55 I A 18.[7]

[26] It is unnecessary for me to state the facts over again I entirely agree with the conclusions of fact of my learned brother that in this case it must be held that no special citation had been issued to or had been served on Sheopati Kuer separately from her mother Rajbansi Kuer Rajbansi Kuer contested that application bona fide not only in the Court of the District Judge but also before the High Court

[27] The critical question to be determined is whether any just cause has been established to revoke the grant of the letters of administration within the meaning of S 263, Succession Act It is argued on behalf of the appellant that since it is found that no citation had been issued on the appellant (and she was a person entitled to a special citation) the original proceeding to obtain grant of letters of administration became defective in substance and this must be deemed to be a just cause as provided by the Explanation to S 263 On the other hand it is argued on behalf of the respondent that the minor was not entitled to a special citation and attention was invited to S 283, sub cl 1 (c), Succession Act in support of the argument that the District Judge had a discretion to issue citation on the appellant and it must be presumed that he was satisfied that the interest of the appellant will be properly looked after by her mother and there was no need to have the appellant formally on the record as an opposite party when she would certainly be represented by her mother in those proceedings

[28] I do not agree with the contention of the respondent that the District Judge had a discretion in the matter He must, if he comes to know of the existence of persons who claim to have any interest in the estate of the deceased, issue citation upon all those persons to come and see the proceedings The proceedings of the letters of administration case which have been placed before us in the form of the paper book of the Calcutta High Court do not show that the District Judge ever considered the question whether the appellant should or should not be served with special citation It must, therefore, be held that special citations required to be issued to the appellant have not been ...

[29] Does this fact alone make the proceeding defective in substance? It will be observed ... the words are 'defective in substance' ... merely 'defective,' I am of opinion ... special circumstances of ... held that the proceed... substance, it has ...

[18] I now turn to those decisions where absence of citation, in certain circumstances, has not been held to be a defect of substance. The earliest decision is 18 Cal. 45.[14] This was a case where the testator died leaving a minor widow and his mother. The mother applied for probate: the usual citations were issued, and the paternal uncle of the minor widow entered a caveat representing that the minor was living under his care and was the heiress *at-law* and that the will was a forgery. It was contended on behalf of the minor widow that as she had not appeared nor had she been specially cited to appear in the probate proceeding, there was just cause for revocation of probate within the meaning of S. 50, Probate Act. Dealing with this contention their Lordships observed as follows :

"Let us examine what the facts are. Kali Prasad Tripati, paternal uncle of the minor, clearly had notice of the proceedings. It is admitted by the minor's mother, who now represents her as her guardian, that he is not on bad terms with the minor, and that the minor has been living in the same house with him. Kali Prasad had no interest whatever in opposing the grant of probate otherwise than as representing the minor. He did oppose the grant of probate, expressly representing that the minor was living under his care and was the heiress-at-law of the alleged testator, and his opposition was successful in the first Court, though the Appellate Court took a different view of the case. And both the Courts regarded him as acting on behalf of the minor. These being the facts of the case and the allegation of fraud and collusion between Kali Prasad and the opposite side being now given up, the only conclusion that we can come to is that the persons under whose care the minor has been living, and who are interested on her behalf, were fully aware of the previous proceedings, and that the party who entered appearance and opposed the grant, though nominally appearing on his own behalf, did really appear on behalf of the minor.

We do not, therefore, think that any just ground has been made out for reopening the proceedings."

[19] The principle laid down in the aforesaid decision was approved in 35 C. W. N. 58[15] and in 11 P. L. T. 353,[16] though in the latter case the decision rested on the question if the applicant had interest in the estate left by the testator. In 1 Pat. 86[17] it has been held that where special citation is not issued upon a person entitled to it, a grant of letters of administration is nevertheless binding on him if he had knowledge of the application for the grant and had an opportunity of intervening.

[20] In 31 C. W. N. 160[6] the sister of the testatrix applied for revocation on the ground, *inter alia*, that two minor sons of a deceased brother of the testatrix had not received separate citation and that their mother was not competent to represent them, as she was not a properly constituted guardian. Regarding this ground it was observed as follows:

"She (the mother) appears to have taken part in the proceedings and put in a petition stating the shares which her sons would, according to her, be entitled to. She does not appear to have done anything injurious to the interest of her sons and nothing has been shown to us which may suggest that their interest was not properly looked after. It must, under the circumstances, be held, despite the absence of a formal order appointing her guardian ad litem, on behalf of the infants that the infants were effectively represented by her in the proceedings."

[21] There are other decisions where the question of delay and acquiescence or subsequent ratification has been considered: see, for example, 14 C. W. N. 1068;[18] 21 C. L. J 555;[19] 19 C W. N. 366[20] and 35 C. W. N. 568.[21] The last decision is of some importance as it lays down that delay in applying for revocation of probate is fatal only when from circumstances attendant upon the delay an inference of waiver can reasonably be made; mere delay, without more is no bar to revocation. I do not wish to examine this question of delay at any greater length, because there is no finding on the question of acquiescence of waiver against the appellant. As has been observed in 21 C. L. J. 557,[2] there may be a distinction between a case where the acquiescence alleged occurs while the act acquiesced in is in progress, and another where the acquiescence takes place after the act has been completed. In the former case the acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it; in the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined obviously on very different legal considerations. It has also been observed in certain cases that a person can be barred of his remedy on the ground of waiver, only when at the time of the alleged waiver he has been shown to have been fully cognizant of his right on the facts of the case. In the case before us all that has been found is that the appellant knew of the probate proceedings long before 1938. I do not, therefore, think that this is a case in which mere delay would bar the remedy of the appellant, in the absence of any finding of acquiescence or waiver.

[22] As a result of a consideration of the authorities mentioned above, I have come to the conclusion that though the appellant did not receive special citation in the probate proceeding which resulted in the grant of letters of administration to the respondents, there is no just cause for revocation in the present case, inasmuch as there was no defect of substance in the said proceeding. The mother of the appellant was her natural guardian. She appeared and contested the grant right up to the High Court. She did not act injuriously to the interest of the appellant, and she was not under the influence of

the [illegible] will [illegible] with him. [illegible] her [illegible] represent [illegible] ter was not [illegible] inasmuch as [illegible] very [illegible] I have arrived [illegible] that the [illegible] will, the [illegible] of [illegible] will [illegible] accepted by the [illegible] will propounded by [illegible] Dikshit [illegible] cerned, [illegible] could [illegible] Court, and all [illegible] objections were taken [illegible] a mere formal contest, and [illegible] that the mother of the appellant was [illegible] with the propounder of the will or was under the [illegible] influence. The paper-books of the appeals heard in the Calcutta High Court show that a large number of witnesses were examined on behalf of both parties, including the mother of the appellant and the doctor who treated Harihar Dikshit before his death. In these circumstances it cannot be said that the contest was a formal contest or that Rajbansi Kuer was in any way influenced by the propounder of the will. There was therefore no defect of substance in the proceedings which resulted in the grant.

[23] For the reasons given above I would hold that there is no just cause for revocation in the present case. I must add that if we had found that there was just cause for revocation we would have revoked the grant and sent the case back to the District Judge for giving the respondents an opportunity of proving the will in solemn form in presence of the appellant. There would undoubtedly be great difficulty in proving the will after the lapse of about 43 years but as observed by their Lordships of the [illegible] of the [illegible] udent [illegible] difficulty would not have stood in the way of revoking the grant.

[24] In view of my finding however that there is no just cause for revocation in the present case the appeal fails and must be dismissed. In the circumstances of the case, there would be no order for costs.

[25] **Manohar Lall, Ag. C. J.** — I have perused the elaborate judgment prepared by my learned brother. I only wish to add a few observations to show why I agree with his conclusions. I do not propose to [illegible] the numerous cases which have been exhaustively reviewed by my learned brother as I am of the opinion [illegible]

[illegible]

[illegible] the appellant [illegible] obtain grant of [illegible] the [illegible] to have [illegible] on behalf of the [illegible] was not entitled to a special citation [illegible] in support of the argument that the District Judge had a discretion [illegible] the appellant and it must be presumed that he was satisfied that the interests of the appellant will be properly looked after by [illegible] there was no need to have the appellant formally on the record as any opposition by her she would certainly [illegible] mother in those proceedings.

[26] I do not agree with the contention of the respondent that the District Judge had a discretion in the matter. He must, if he [illegible] know of the existence of persons who [illegible] have any interest in the estate of the deceased, issue citation upon all the persons to come and see the proceedings [illegible] letters of administration [illegible] placed before [illegible] form of the paper-book of the Calcutta High Court [illegible] District Judge ever considered the [illegible] whether the appellant should or should not be served with special citation. It must therefore be held that special citations [illegible] issued to the appellant [illegible]

[29] Does this [illegible] taken [illegible] the proceedings defective in substance? It will be observed that the words are defective in substance and not merely defective. I am of opinion that in the special circumstances of this case it must be held that the proceedings were not defective [illegible] substance. It has been found as

by which the learned Munsif has impounded two documents and directed the petitioners to pay duty and penalty as required by the provisions of the Stamp Act. The petitioners were defendants in an action for partition. They filed two documents, a hukumnama and a punchnama, which were not admitted in evidence. The suit, which was Title suit No. 5 of 1943, was dismissed on 15-9-1945. After the dismissal of the suit the opposite party, plaintiffs in the suit, filed a petition on 18-9-1945, praying that the aforesaid two documents be impounded, and that the petitioners be directed to pay the duty and penalty thereon. On 25-9-1945, the learned Munsif directed the petitioners to pay Rs. 50 as stamp duty and Rs. 500 as penalty, in all a stamp of Rs. 550, in respect of the punchnama. The petitioners then moved the learned Munsif, praying that the document could not be impounded after the disposal of the suit, and, further, that the petitioners could be made liable only for their proportionate share, and also that if any penalty were realised from the petitioners, the amount should be made part of the costs of the suit. The learned Munsif, by his order dated 13-11-1946, dismissed the objection of the petitioners.

[2] The point raised before us is that the learned Munsif had no jurisdiction to impound the document after he had become *functus officio*. In other words, the contention before us is that the learned Munsif could not impound the document under S. 33, Stamp Act, after the decision of the suit in which the document had been filed. The point is not covered by any authority of this Court, but learned counsel for the petitioners has referred to several decisions of other High Courts, in which it has been held that the Court is *functus officio* after the disposal of the suit, and cannot impound a document under S. 33, Stamp Act after decision had already been given in the suit in which the document was filed. The decisions relied on by learned counsel for the petitioners are: *8 Mad. 564*,[1] *A. I. R. 1930 Bom. 392*,[2] *54 Cal. 445*[3] and A. I. R. 1942 Lah. 257.[4] The facts of some of those cases are not exactly similar to the facts of the case before us, except the case in A. I. R. 1942 Lah. 257.[4] In this last case the defendant had filed two receipts A. and B. They were filed with the written statement but not tendered or produced in evidence. When the Court pronounced judgment it was directed that the receipt A should be impounded. The direction was oral, and by mistake the endorsement of impounding was noted on the other receipt, namely, receipt B. When this receipt B was sent to the Collector as provided by S. 38, Stamp Act, the Collector returned the receipt saying that as the right document had not been impounded, no action could be taken by him. Then, long after the decision of the suit, the Subordinate Judge wrote an endorsement on *receipt* A, and the document was impounded. The matter was then referred to the High Court by the Chief Controlling Revenue Authority, and several questions were propounded, of which question No. 2 was as follows:

> "Can an endorsement of impounding on the back of document A at a date when the case had been finished serve to rectify the original error in endorsement?"

This question was answered in the negative, and it was observed that the trial having been finished on 30-8-1938, an endorsement on the receipt A made on 3-4-1939, could not rectify the original error, as the Court was clearly *functus officio*. Dealing with this question Bhide J. observed as follows:

> "It must be held that the document was impounded long after the Court had become *functus officio*. There is ample authority for the proposition that a Court has no power to impound a document under the Stamp Act after it has become *functus officio*."

As at present advised, I am not prepared to differ from the decisions referred to above, which clearly show that the Court could not impound the documents after it had become *functus officio*.

[3] The rule is, therefore, made absolute, and the order of the learned Munsif impounding the documents and directing the petitioners to pay duty and penalty is set aside. There will be no order for costs of the hearing of this application.

**Agarwala Ag. C. J.** — I agree.

V.B.B. *Rule made absolute.*

## A. I. R. (34) 1947 Patna 444 *[C. N. 146.]*

MEREDITH AND SINHA JJ.

*Ram Keshwar Mahton and others—Defendants — Appellants* v. *Hari Charan Mahton and others, Plaintiffs, and others, Defendants—Respondents.*

Appeal No. 564 of 1944, Decided on 21-3-1947, from appellate decree of Sub-Judge, Shahabad, D/- 4-2-1944.

Limitation Act (1908), Art. 142—Possession under unregistered patta for number of years—Dispossession by trespasser—Suit for possession on possessory title if lies.

The plaintiff who had been in possession of certain land ever since 1925 under an unregistered patta from the landlord was dispossessed in 1939 by the defendant who was a mere trespasser. The plaintiff thereupon brought a suit for declaration of his title and for possession.

*Held*, that the plaintiff's peaceful possession for a number of years since 1925 was *prima facie* evidence of title sufficient to enable him to recover possession unless the defendant could show a better title. The fact that the plaintiff had a defective title as against his landlord in view of the fact that the patta was not registered was of no avail to the defendant who was a mere trespasser. Even if the landlord had sued the

Lim Act—(42 Com) Arts 142 & 144 N 4, Pt 7 and 13

*Cases referred* —

1 (32) 11 P L T 34 16 A I R 1929 Pat 601 8 Pat 351 119 I C 906

2 (26) 5 Pat 765 14 A I R 1927 Pat 1 98 I C 779

3 (21) 6 Pat L J 478 8 A I R 1921 Pat 237 62 I C 1 (F B) Shiva Prasad Singh v Hira Singh

*Mahabir Prasad D N Varma and Kanhaiyaji*—for Appellants

*Harbans Kumar and B K. Narain Singh*—for Respondents.

**Meredith J.**—This second appeal is by the defendants first party against a judgment of reversal decreeing the suit The plaintiffs are the members of a joint family, and sued for declaration of title and recovery of possession after removal of certain encroachments said to have been made by the appellants on two plots of homestead land, one comprising 2 *kathas* 5 *dhurs* and the other comprising 16 *dhurs* immediately to the south thereof Plot 1 was settled by the landlords on 22nd September 1925, by means of an unregistered *patta*, with a member of the plaintiffs' family, Hari Narain, son of Jawahir Mahto, the then head of the family This Hari Narain is since deceased, and his widow is defendant 19 Plot 2 was similarly settled by an unregistered *patta* on 24th March 1926 in the name of Hari Charan Mahton, plaintiff 1, who is son of Jawahir The plaintiffs' case was that actually both these settlements were made with the joint family, but the former was simply in the name of Hari Narain and the second in the name of Hari Charan

[2] On 15th March 1927, the landlords gave

Shaikh Mohammad, and on 6th April 1939, defendants first party purchased this plot from Sheikh Mohammad According to the plaintiffs, shortly *afterwards defendants first party*, the present appellants, began to construct a house on the plot settled with them, and while doing so made encroachments on both the plaintiffs plots Shortly after this on 10th January 1940, they took a *kebala* from defendant 19 Harinarain's widow, in respect of the 2 *kathas* 5 *dhurs* settled in the name of Hari Narain, and this *kebala* was taken in the name of defendant 16 said to be *benamidar* merely

[3] The defendants' case was that the settlement of the 2 *kathas* 5 *dhurs* in 1925 was made with Hari Narain who was then separate from the rest of the plaintiffs family It was a settlement exclusively with him, the land was inherited by his widow and consequently the defendants acquired a good title by their purchase from the widow in 1940 They further alleged that this plot of 2 *kathas* 5 *dhurs*, which they had purchased, included the 16 *dhurs* of which the plaintiffs subsequently took settlement in the name of Hari Charan

[4] Both the Courts below have agreed in finding that the 16 *dhurs* was not included in the 2 *kathas* 5 *dhurs* but lay to the south of it It has also been found that the alleged encroachments had been made, indeed the defendants did not deny that Rather, as I have said, they claimed title to and possession over the whole area The learned Munsif held that the settlement had been made with Hari Narain, who was separate and he accordingly dismissed the suit, but the learned Subordinate Judge reversed this finding His finding which is binding on us in second appeal, is that Hari Narain was a member of the joint family with his father and brothers and that the father, that is Jawahir, acquired the lease for and on behalf of the joint family in Hari Narain s name He further held that the plaintiffs, who had already been in possession for more than 12 years were entitled to recover possession for themselves and defendants 17 and 19 He accordingly decreed the suit

[5] The only argument which has been addressed to us in second appeal is that the plaintiffs cannot succeed because they have established no title in themselves Even if the defendants have been found to have no title, nevertheless they are in possession, and the plaintiffs cannot eject them unless they establish their own title A suit for declaration of title and recovery of possession can only succeed on the plaintiffs establishing their own title, and cannot succeed on the weakness of the defendants' case Here the plaintiffs have established no title, because the unregistered *patta* could convey none

[6] This argument, in my opinion, is not sound The plaintiffs do not base their case on the *patta* They have used the unregistered *patta* for a collateral purpose, namely to explain the nature of their possession and to show that they were not trespassers but in possession of the lands by arrangement with the landlords. Whether their title was a good title or not as against the landlords was a matter between them and the landlords, not one which concerned the defendants The plaintiffs have been found to

In para. 10 of their plaint the plaintiffs stated inter alia,

> "for the purpose of limitation, time will run from the 19th June, 1934, corresponding to the 4th Asarh, 1341 B. S., the date of the last payment of Rs. 10 as under S. 20, Limitation Act, all such payments having been made and duly noted in the hathchitha khata within the time prescribed by the law of limitation, fresh period of limitation shall be computed from the time when each of such payments was made."

[3] In their defence, the defendants first party denied that the said loans were for family necessity. The major defendants of the defendants first party pleaded in para. 4 of their written statement that the suit was time-barred under the general and special law of limitation. In para. 6 they specifically denied the partition and that the handnotes in question had fallen exclusively to the share of the plaintiffs. In paragraph 7 they alleged that only Rs. 1000 was in fact advanced to them on 9-11-1930, and not Rs. 2000 as alleged by the plaintiff. In para. 9 they stated that the statement of account given in Schedule A of the plaint was untrue, that the claim of the plaintiffs was excessive and exorbitant and that the loan of Rs. 500 had already been paid off. In para. 11 they stated that the cause of action and the application of S. 20, Limitation Act, was incorrect.

[4] The minor defendants of the defendants first party set up a plea in which they denied the alleged family necessity for the loans but both the Courts below have decided this question of fact against these defendants and no question thereon arose in this appeal. In para. 4, of the written statement these minor defendants stated:

> "4. That these defendants have not any information about the allegations contained in paras. 1, 2, 3, 4, 7, 8, 9, 10 and 11 of the plaint and they are not in a position to admit or deny the same and they submit that the liability of defendants, as alleged, incurred either for a new business or for a purpose by which these defendants were not at all benefited and a liability which did not arise out of any joint necessity cannot be fastened on them."

[5] At the trial the defendants attempted to prove that the last three payments of Rs. 10 each on 19-5-1934, 3-6-1934 and 19-6-1934 had not in fact been made by them. But both the Courts below have found against the defendants on this point.

[6] The only question raised before us was as to whether the suit was time-barred by the provisions of S. 20, Limitation Act as it then read. Mr. S. N. Bose, for the appellant, argued that there was no evidence given at the trial in support of the allegation that the last payment of Rs. 10 on 19-6-1934, was paid towards interest 'as such', that it was not alleged that it was paid in part payment of the principal and that the suit, which was instituted on 17-6-1937, was therefore time-barred. He relied upon the decision of the *Judicial Committee* in 67 I. A. 160.[1]

[7] For the respondents it was argued that this point was not open to the appellants because there was no denial in the written statements of the allegation in the plaint that this sum of Rs. 10, together with the other payments together constituting the payment towards interest since Baisakh 1338 B. S of Rs. 115 referred to in paras. 7 and 9 of and in Sch. A to the plaint, had been so paid towards interest.

[8] In reply, Mr. S. N. Bose, argued that the allegations in the plaint were not sufficiently specific to call for a specific denial, that the statement in para. 9 of the *written statement* of the major defendants that the account in Sch. A to the plaint together with the allegation in para. 11 thereof that the *alleged application* of S. 20, *Limitation Act*, was incorrect constituted, in the then apprehended state of the law, a sufficient denial of the allegations of the payments towards interest and that an issue *on the point was sufficiently raised in* issue 4 namely, "Is the claim in suit barred by limitation". He further pointed out that it was perfectly clear that the payment of Rs. 50 *made on the 2 6-1931, which was included in the* alleged total payments towards interests of Rs. 115 above referred to, could not possibly have been a payment towards interest because *on the respondents' own account in the plaint* only Rs. 10 or less was in fact due as interest at that date and therefore that the allegation as to the payment of the sum of Rs. 115 towards *interest was palpably false on the face of the* plaint.

[9] Mr. S. N. Bose contended that, at the date of the trial, the law as to the interpretation of S. 20, *Limitation Act, as it then read* was thought to have been correctly set out in the judgment of Sir Trevor-Harries C. J. and Manohar Lall J. in 18 Pat. 253[2] in the course of which their Lordships, *following two previous* decisions of this Court, held that the words 'as such' in S. 20 (1), Limitation Act were redundant and that an appropriation of a payment to interest made in the plaint was sufficient to satisfy the section and that consequently the parties attached no importance to the otherwise and now relevant issue of fact as to whether the payment of the above-mentioned sum of Rs. 10 on 19-6-1934, had in fact been paid towards interest as such. He further pointed out that the appeal to the Additional District Judge was heard after the Judicial Committee in 67 I. A. 160[1] had overruled the previous Patna decisions and enunciated the true construction of S. 20 (1), Limitation Act and that in that appeal the appellants had raised

the defendants for recovery of Rs 2400 on account of the failure of defendants 1 and 2 to deliver chokar as agreed to by them

[2] Mukhtar Singh (Defdt 4) confessed judgment The other defendants contested the suit One of the pleas raised was that the Court at Nowshera had no jurisdiction to entertain the suit The basis of the plea was not fully disclosed in the written statement The evidence led shows that defendants contention was that according to the agreement which formed the basis of the suit all disputes arising out of the contract had to be settled at Lyallpur, and, therefore the Courts at Lyallpur alone had jurisdiction to try the suit

[3] The learned Sub-Judge, First Class, Nowshera, who heard the case, accepted the contention of the defendants and held that he had no jurisdiction to entertain the suit He, therefore ordered that the plaint be returned for presentation to a Court of competent jurisdiction

[4] The learned Additional Judge dismissed plaintiff's appeal He has come up on revision It is contended on his behalf that the Court at Nowshera had jurisdiction to hear the suit The clause in the agreement relating to the forum for the settlement of disputes had not been expressly relied on by the defendants, and in any case, the clause has no reference to suits It was further urged that A. I. R. 1946 Lah. 57,[1] which was relied on by the learned Additional Judge did not lay down good law, and that the view taken in A I. R 1923 Lah 425,[2] though over ruled by the Full Bench in A I R 1946 Lah. 57[1] ought to prevail A third ground on which the orders of the Courts below were assailed was that (Defdt 4) assigned his rights to the plaintiff at Nowshera Relief had been prayed for against (Defdt 4), also The assignment constituted a part of the cause of action against (Defdts. 1—3) as well The Courts at Lyallpur, therefore, could not hear the suit as laid

[5] The first contention raised by the learned counsel need not detain us long The written statement does not bring out in express terms that there was an agreement between defendants 1 and 2 on one side and defendant 4 on the other, that suits arising out of the agreement between them shall be instituted only in Courts at Lyallpur The agreement, however, was put in evidence without any objection It was considered by the learned trial Judge He reproduces the clause of the agreement on which defendants relied, in his judgment This is cl 8 of Ex. D-3, and it is as follows

"All disputes arising out of the contract shall be settled at Lyallpur, where all contracts are made

He held, relying on cases from Allahabad, Bombay and Madras High Courts that the clause was valid and enforceable and that it restricted the right of defendant 4 and therefore of the plaintiff, who is the assignee and the representative of defendant 4, to institute suits arising out of the agreement for the supply of chokar in Courts at Lyallpur In appeal also the basis of the decision was the clause referred to above It is now too late to urge that the agreement (Ex D 3) or the clause that it contains which has been relied on and considered in the two Courts below should be left out of consideration on the ground that it was not expressly referred to in the written statement

[6] The next question relates to the interpretation of this clause It provides that disputes arising out of the agreement between the parties shall be settled at Lyallpur The contention that it does not apply to suits cannot prevail It provides for the settlement of disputes The disputes can be settled either by arbitration or by resort to Courts of law. Whatever the method of settlement, the clause fixes the forum for such settlements Lyallpur was the place which the parties agreed to for all settlements of disputes arising out of the agreement which forms the basis of the suit If therefore the settlement of the dispute is sought by the institution of a suit the forum for the suit according to cl 8 of the agreement is Lyallpur Courts at places other than Lyallpur may have jurisdiction, but the parties to the agreement made their choice at the time of the agreement and restricted themselves to Lyallpur Courts if assistance of Courts was needed [illegible]

make it anywhere It is only [illegible] cannot be amicably settled [illegible] there is a dispute Such a dispute [illegible] as stated above only by arbitration [illegible] in Courts constituted by law [illegible] between the parties [illegible] Lyallpur [illegible] for the settlement of disputes [illegible] aims at the settlement of such [illegible] for, covered by the clause

[7] The third point [illegible] is whether the clause [illegible] not The contention [illegible] sel for the petitioner [illegible] ment relied on [illegible] the provisions [illegible] section provides [illegible] any party [illegible] enforcing [illegible] contract [illegible] ordinary [illegible] in the [illegible] no [illegible]

representatives in the matter of enforcing all their rights under the agreement. There is no restriction at all on their right to resort to usual legal proceedings in the ordinary tribunals. The restriction is only so far as the choice between different ordinary Courts is concerned. The Courts at Lyallpur had jurisdiction. This is not denied. The Courts at other places too may have jurisdiction, but the parties agreed at that time that the aid of the Lyallpur Courts would be invoked should disputes arise. There is nothing in the language of S. 28, Contract Act, which prohibits the parties from entering into an agreement by which they restrict their choice of the forum which the law allows them. Clause 8 of the agreement, therefore, is not opposed to the provisions of S. 28, and is valid and enforceable. The point arising in this case arose in two cases which were disposed of by a Full Bench decision of the Lahore High Court reported in A. I. R. 1916 Lah. 57.[1] The learned Judges after a careful and detailed examination of all the authorities available from the different High Courts came to the considered conclusion that an agreement between parties to a contract to the effect that a suit concerning disputes arising between them on the basis of that contract should be instituted in one only out of two competent Courts having territorial jurisdiction over the subject-matter of that suit is valid and enforceable and is not void under S. 28. The view so clearly expressed is fully borne out by the language of S. 28. The learned counsel for the petitioner, however, relied on A. I. R. 1923 Lah. 425.[2] This case was considered and overruled by their Lordships of the Lahore High Court in the Full Bench case referred to above. The learned Judges in this case observed that litigants cannot by agreement *inter se* divest a Court of its inherent jurisdiction over the subject-matter of a suit. This is perfectly correct, but the territorial jurisdiction of a Court is distinguishable from its inherent jurisdiction. An objection to the territorial jurisdiction of a Court can be waived. The judgment or decree of a Court possessing no territorial jurisdiction is not void. The parties to an agreement, therefore, when agreeing to a particular forum for the settlement of their disputes when the Courts there are possessed of inherent jurisdiction do not invest or deprive any Court of its inherent jurisdiction. In any case so far as S. 28 is concerned, it comes into play only if an agreement or a clause in an agreement restricts absolutely a party from enforcing his rights by the usual proceedings in the ordinary tribunals. These conditions are not satisfied by the clause which forms part of the agreement between the parties to this case, and, therefore, in respectful agreement with the view of their Lordships of the Lahore High Court, as expressed in the Full Bench case, I hold that clause 8 of the agreement restricting the rights of the parties to institute suits for the settlement of their disputes arising out of the agreement between them in the Courts at Lyallpur is perfectly valid and enforceable.

[8] The last point raised was that the assignment was made at Nowshera, and, therefore, so far as defendant 4 is concerned he could be sued only at Nowshera or at the place where he is residing viz., Mardan. The question whether rights under the agreement dated 26-1-1942 have been assigned to the plaintiff in point of fact was not decided by the learned Addl. Judge. He disposed of the case on the assumption that an assignment in favour of the plaintiff existed. I shall also assume for the purpose of this contention that a vaild assignment in favour of the plaintiff exists. The argument of the learned counsel for the petitioner, however, loses sight of the fact that the suit is not against defendant 4 alone. Relief is also prayed for against defendants 1 and 2, and their agent (defendant 3), through whom the agreement for the supply of 300 bags of chokar was made. Any liability that the first three defendants may have incurred under the terms of the agreement can be enforced only at Lyallpur. If defendant 4 had been forced to institute a suit for enforcing his rights against defendants 1-3, he would have found himself under an obligation to institute a suit at Lyallpur. His representative or successor-in-interest viz., the plaintiff can be in no better position. He has stepped into the shoes of defendant 4. He has taken over all the rights and obligations of defendant 4. If he wants to enforce his rights under the agreement entered into between defendant 4 and defendants 1 and 2, he cannot ignore the restrictions under which the enforcement of his rights is possible according to the terms of the contract. If the relief is claimed against defendants 1-3, they surely can rely on clause 8 and insist that the suit against them should be instituted at Lyallpur. If the suit had been only against defendant 4, it would be a different matter, but as it stands the Court at Nowshera had no jurisdiction to hear it.

[9] For the reasons given above the petition fails and is hereby dismissed with costs. Pleader's fee Rs. 50. Order announced.

N.S.D. *Petition dismissed.*

[C N. 19]

# A I R (34) 1947 Peshawar 51

RAM LABHAYA J

*Muqarrab Ismail and others — Petitioners v Mir Ahmed Shah and others — Respondents*

Civil Revn No 263 of 1946 Decided on 31 2 1947, against order of Senior Sub-Judge Mardan D/ 22 7 1946

Record of rights—Custom recorded in—Absence of entry in subsequent records — Effect

An entry in a wajib-ul arz is good evidence of custom The absence of an entry of such a custom in the subsequent record of rights does not raise any presumption that the custom has ceased to exist nor is it any evidence to that effect It is only by disuse that the custom can cease to exist 118 I C 150 (All) *Rel on*, 11 Lah L T 101 *Disting* [Para 7]

*Cases referred —*

1 (92) 18 P R 1892 Miran Bakhsh v Rahim Bakhsh

2 (29) 118 I C 150 (All) Rafi un nissa Begam v Chunni

*Hukum Chand and L Baij Nath*—for Petitioners

*Sheikh Allah Bakhsh* — for Respondents (1 to 3 and 5 to 7)

*Pandit Raghu Nath* (for Taj Mohd Mohd Khan Shad Khan Akbar Khan Mahamood Khan Mohd Anwar and Said Jalal)—for Respondents (Proprietors)

**Order.** — Plaintiff respondents six in number, are residents of village Panjman They instituted a suit for a perpetual injunction against defendants 1 14 in the first instance restraining them from preventing the plaintiffs from grazing their cattle in Pahar Panjman measuring 5721 kanals 5 marlas comprised in the khasra numbers mentioned in the plaint. They amended the plaint later under orders of the Court In the amended plaint defendants 15 45 also residents of village Panjman were impleaded along with defendants 46 3440 who are the owners of Pahar Panjman which is the shamilat of the three villages namely, Manai Zarobi and Kotha Two persons from each village were appointed representatives of the owners of the shamilat under O 1 R 8 Civil P C The case for the plaintiffs was that the plaintiffs and defendants who were residents of Panjman, had ancient grazing rights in the Panjman hill They averred that these rights were being exercised by them without let or hindrance till about four months before suit when defendants 1 37 without any excuse or justification obstructed them in the exercise of their legal rights

[2] Defendants 1 45 who were residents of village Panjman did not put in any written [illegible]

[illegible] ... ing the Court on all the hearings

[3] The owners of the shamilat put in a written statement They pleaded that the inhabitants of village Panjman had no right to graze cattle in the Panjman hill They could only graze their cattle in that hill with their permission Two issues were framed which are as follows

(1) Have the plaintiffs grazing rights in the suit land?

(2) Are plaintiffs entitled to perpetual injunction as prayed for?

[4] The learned Sub-Judge of Swabi who heard the case found that the grazing rights which the plaintiffs claimed were recognized in the settlement of 1895 96 but under the wajib ul arz of 1927 28 these rights could be exercised only in the culturable land after [illegible]

Mohd [illegible] had [illegible] plain[illegible] better right than the plaintiffs themselves in the Pahar They could not therefore prevent the plaintiffs from grazing their cattle

[5] Eleven out of the first 37 defendants pre[illegible]

[illegible] cognized the right which the plaintiffs claimed The wajib ul arz prepared in 1895 96 confirmed it The omission relating to the unculturable area of Pahar Panjman was due to inadvertence and this did not affect the right which had been recognized at the two previous settlements. His conclusion was that plaintiffs and defendants 1 45 all residents of village Panjman had grazing rights over the disputed shamilat hill.

[6] Sixteen defendants have come up on revision It is contended on their behalf that no injunction could have been granted to the plaintiffs as the right claimed by them has not been proved to exist It was pointed out that whatever may have been said in the wajib ul arz of 1895 96 or at the time of the [illegible] the determining factor in the case was the latest wajib-ul arz of 1927 28 According to this wajib ul arz grazing rights were allowed to the inhabitants of Panjman in the area under cultivation when there were no crops on those areas As there was no reference to the unculturable parts of the hill in the last wajib-ul arz the presumption from the omission was that it was deliberate and that there was good reason for it In support of this contention reliance was placed on 11 Lah. L. T. 101.

[7] This argument cannot prevail [illegible]

denied that at the settlement of 1895-96, the occupancy tenants of the shamilat of village Panjman were examined on the question of the rights of the villagers in the shamilat. Their statement about their customary right of grazing cattle in the shamilat was that the proprietors of the shamilat were not residing in village Panjman, and that there was no particular Chiragah in the village, but there was one hill (Pahar) in which the cattle of the villagers did graze except in the rainy season. The villagers also had the right to graze cattle in the areas under cultivation after the crops had been removed. The learned counsel does not deny that the villagers of Panjman had the right according to the provisions of the wajib-ul-arz of 1895-96. His contention is that the entry with respect to this right was not repeated in 1927-28, and, therefore, cannot be regarded as in force now. This contention does not derive any support from the authority relied on by the learned counsel. The case that he cited draws a distinction between the records of customs and records of agreements, and lays down that the records of customs persist over a settlement as laid down in 18 P. R. 1892[1] while the records of agreements do not persist unless the contrary expressly appears. In other words, the presumption from the omission in the wajib-ul-arz entry of 1927-28 would avail the defendant-petitioners only if the provisions of the wajib-ul-arz of 1895-96 could be regarded as an agreement between the inhabitants of village Panjman which is not the case. The Wajibularz of 1895-96 embodies a statement of custom. The heading of the column in which the statement appears is "statement of zamindars about the existing customs of the village." The proprietors were not present at the time of the statement. The statements were never recorded. The occupancy tenants admitted the existence of a custom by which the residents of the village could graze their cattle in the hill at all times except in the rainy season, and, in culturable parts of the hill only, after the crops had been removed from them. Being obviously a statement of customary rights of the villagers, the failure on the part of the revenue authorities to repeat the entire statement in the wajib-ul-arz of 1927-28 cannot take away the right. A customary right can cease to exist only by disuse. If the right was lost by disuse, it was open to the defendants to allege and prove that fact. Yar Mohd. alone came in the witness-box on behalf of the defendants of village Panjman, the contest on whose behalf was nominal and half-hearted. They did not even put in any Jawab Dawa. It was never pleaded that the right which the villagers had in 1895-96 was subsequently lost by some process known to law. Yar Mohd. in his statement conceded that even upto the institution of the suit the villagers were grazing cattle in the hill under a certain arrangement. This did not rebut the plaintiffs' claim or the evidence that they had led as to the continuous and uninterrupted exercise of the right which was conceded to them by the wajib-ul-arz of 1895-96. As laid down in 118 I. C. 150,[2] an entry in a wajib-ul-arz is good evidence of custom and the absence of any entry of such custom in the subsequent records of rights does not raise any presumption that the custom has ceased to exist, nor is it any evidence to that effect. The omission, therefore, on which the learned counsel for the petitioners relies cannot be regarded as proof of the fact that custom which did exist in 1895-96 had ceased to exist before 1927-28 particularly when no such plea was put forward, and there is absolutely no other evidence to support it. In fact the necessary implication of the entry in the wajib-ul-arz of 1927-28 also is that the customary rights which admittedly existed at the time of the previous settlement had not been abrogated, for it is inconceivable that the inhabitants of the village should be given grazing rights in culturable areas, whereas such rights should be denied to them in those parts of the hill which had never been reclaimed or brought under cultivation. There is, therefore, really no deliberate omission in the wajib-ul-arz of 1927-28 which will raise the presumption that the rights of grazing cattle in the Panjman hill which were being enjoyed in 1895-96 came to an end before 1927-28. The contesting defendants, therefore, have no right to prevent the plaintiffs from grazing their cattle in the Panjman hill, but the right is subject to the qualifications mentioned in the settlement records of 1895-96 and 1927-28.

[8] The suit, therefore, has been correctly decreed, and I see no reason to interfere. The petition is dismissed. The parties shall bear their own costs in this Court. Order announced.

N.S.D. *Petition dismissed.*

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## A. I. R. (34) 1947 Peshawar 52 *[C. N. 20.]*

RAM LABHAYA J.

*Abdul Qadar s/o Faqir Mahomed Uzer and another— Defendants —Petitioners* v. *Khalilur Rahman s/o Faqir Mahomed Uzer—Plaintiff — Respondent.*

Civil Revn. No. 346 of 1946, Decided on 1-4-1947, to revise order of Dist. Judge, Hazara at Abbottabad, D/- 18-11-1946.

Tort — Assault—Damages — Costs of criminal prosecution.

Costs incurred in criminal prosecution cannot be recovered as part of damages or compensation for an assault : 2 A. I. R. 1915 Lah. 187 and 18 A. I. R. 1931 Lah. 648, *Foll.* [Para 4]

*Cases referred* —
1 (16) 17 P R 1916 2 A I R 1915 Lah 187 30 I C 485 Jagan Nath v Hakim
2 (31) 18 A I R 1931 Lah 648 134 I C 207 Lahori v Ramchand

*Sher Khan for L Narain Dass*—for Pet t oners
*Malik Khuda Bakhsh Khan*—for Respondent

**Order** — Khalilur Rahman plaintiff instituted a suit for the recovery of Rs 300 as compensation for damages suffered in consequence of a grievous hurt caused to him by Abdul Qadar and Mohd Saeed defendants The sum of Rs 300 claimed consists of the following items

(a) Rs 30 as the hire for a car from the village to the Police station

(b) Rs 126 as general damages for physical injury and mental trouble

(c) Rs 144 spent in the prosecution of litigation arising out of the assault

[2] The case was heard by Sub Judge, 4th class Abbottabad He allowed the plaintiff a decree for Rs 292/ He held him entitled to the first two items claimed As regards the third item claimed by the plaintiff his finding was that Rs 136 and not Rs 144 were proved to have been spent on litigation On appeal the learned District Judge agreed with the Court below that plaintiff was entitled to the two items, namely Rs 30 and Rs 126 As regards the third item he found that plaintiff could not claim costs of the entire litigation There were cross cases The defendants were challaned under S 325/34 I P Code They were convicted A cross-complaint under S 323 I P Code was put in against the

the rest of the expenditure on the ground that costs incurred by the plaintiff in prosecuting the defendants for the injury caused to him could not be recovered as part of the damages or compensation for the assault on him He therefore reduced the decretal amount to Rs 206

[3] Both sides have come up on revision On behalf of the defendants it is urged that the suit should have been dismissed The plaintiff claims that costs of the litigation which had been disallowed by the lower appellate Court should also be decreed This order will dispose of both the revision petitions So far as the first two items viz Rs 30 and Rs 126 are concerned the Courts below have concurrently found that plaintiff has succeeded in making out a case for their recovery The findings as regards both the items are in accordance with law They involve no departure from any recognized principle of law or equity The Courts below are not alleged to have committed any material irregularity in the exercise of their jurisdiction in arriving at these findings They cannot be disturbed in revision

[4] So far as item 3 is concerned, the learned counsel for the plaintiff has conceded that a sum of about Rs 90 was spent by the plaintiff in prosecuting the defendants under S 325/34 I P Code and a sum of Rs 45 was spent by him in defending himself in the complaint instituted by the defendants against him So far as the sum of Rs 90 spent by the plaintiff in prosecuting the defendants is concerned the claim is obviously inadmissible as costs incurred in criminal prosecution cannot be recovered as

was held distinctly in these cases that costs incurred in criminal prosecution cannot be recovered as part of the damages or compensation for an assault The learned counsel for the plaintiff has not been able to cite any authority against this view which is unquestionably correct Following these authorities I hold that the item of Rs 90 out of Rs 144 cannot be claimed by the plaintiff The balance of Rs 45

No evidence has been produced by the defendants in this case to show that there was a reasonable or probable cause for instituting the complaint The learned District Judge has held that prosecution of the plaintiff in this case was malicious I see no reason to interfere with this finding of fact Plaintiff therefore is entitled to Rs 45 under this head This is admittedly the amount spent by him for defending himself The learned District Judge was wrong in allowing him Rs 50 The total amount which the plaintiff is entitled to recover thus comes to Rs 201 The amount allowed to him is Rs 206

[5] I therefore accept the revision petition of the defendants and reduce the decretal amount to Rs 201 The decree of the lower appellate Court will be varied to this extent only The revision petition of the plaintiff is dismissed Both parties shall bear their own costs in this Court Order announced

N S D *Decree modified*

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*[C N 21]*

**A I R (34) 1947 Peshawar 53**

MOHD IBRAHIM J C. AND RAM LABHAYA J

*Mrs Syble Massey—Defendant—Petitioner* v *Mr J K Massey—Plaintiff—Respondent*

C v l Revn No 9 of 1947 Decided on 30 5 1947 from order of Sub Judge 4th Class Peshawar D/ 19 11 1946

**(a) N. W. F. P. Courts Regulation (I [1] of 1931), S. 34—'Case decided'—Meaning of — Interlocutory order — Order of lower Court holding that it has jurisdiction to try suit—Civil P. C. (1908), S. 115.**

The rule that ordinarily no interlocutory order is revised by the High Court is not inflexible. It depends on the nature of the interlocutory order passed whether it is a 'case decided' within the meaning of S. 34 or whether it is a routine order, which does not put an end to any controversial matter. 31 A. I. R. 1944 Pesh. 1, *Rel. on.* [Para 6]

Where the lower Court in a suit for restitution of conjugal rights by an Indian Christian holds on a preliminary issue that it is not debarred from taking cognizance of the suit by the Divorce Act, 1869, or any other enactment and has, therefore, jurisdiction under S. 9, Civil P. C. to entertain it, the order of the lower Court is a 'case decided.' [Para 6]

C. P. C.—('44-Com), S. 115, Note. 5, pt. 7.

**(b) Civil P. C. (1908), S. 9 — Suit for restitution of conjugal rights between Christians—Jurisdiction of civil Courts — Divorce Act (1869), Ss. 4 and 32.**

Where the parties are Christians a decree for restitution of conjugal rights can be granted only by the District Court or the High Court on the petition of the husband or the wife as the case may be and the suit is excluded from the cognizance of ordinary civil Courts. [Para 7]

C. P. C.—('44-Com), S. 9, N. 28.

*Case referred:—*

1. ('44) 1944 Pesh. L. J. 1 : 31 A. I. R. 1944 Pesh 1 : 211 I. C. 313, Jiwan Singh v. Mt. Mahaboob Jan.

*Jaggan Nath*—for Petitioner.
*S. Anup Singh*—for Respondent.

**Mohd. Ibrahim J. C.** — On 27-7-1946 Mr. J. K. Massey, an Indian Christian, instituted a suit for restitution of conjugal rights against his wife, Mt. Sybil Massey, also an Indian Christian, in the Court of the Senior Sub-Judge at Peshawar. The suit was sent by the Senior Sub-Judge to the Court of the Sub-Judge 4th Class, Peshawar, for disposal.

[2] The defendant *inter alia* pleaded that the suit was excluded from the jurisdiction of the ordinary civil Courts by the provisions of the Divorce Act, [IV] of 1869. On this the Sub-Judge framed a preliminary issue, which reads thus:

"Whether a suit for restitution of conjugal rights is not maintainable in this Court" ?

[3] The Sub-Judge was of opinion that there was nothing either in the Divorce Act or in any other enactment which debarred him expressly or impliedly from taking cognizance of the suit and that, therefore, S. 9, Civil P. C., conferred upon him jurisdiction to entertain the suit. He accordingly decided the preliminary issue against the defendant.

[4] From the above order a revision petition on behalf of the defendant has been preferred in this Court.

[5] As the question raised in the petition is an important one, the case was referred by one of us to the Bench for decision.

[6] Learned counsel for the plaintiff-respondent has taken a preliminary objection namely, that the order of which revision is sought being interlocutory, it is not open to revision. No doubt, the order in question is an interlocutory order and the ordinary rule is that no interlocutory order is revised by the High Court, but the rule is not inflexible. As pointed out by a Bench of this Court in 1944 Pesh. L. J. 1[1] it depends on the nature of the interlocutory order passed, whether it is a "case decided" within the meaning of S. 34 North-West Frontier Province Courts Regulation, 1931, relating to the revisional powers of this Court, or whether it is a routine order, which does not put an end to any controversial matter. Considering the order in question there can be no manner of doubt that it has decided so far as the Sub-Judge is concerned a matter in dispute between the parties. It is an order which, essentially relates to the jurisdiction of the Sub-Judge to entertain the suit and it relates to a matter, which if decided wrongly in favour of the plaintiff, may result in an elaborate trial which would otherwise be unnecessary. We accordingly overrule the preliminary objection and hold that the order in question is open to revision.

[7] Sections 4 and 32, Divorce Act, are relevant and material to the decision of the main question involved in the petition. Section 4 provides that the jurisdiction now exercised by the High Courts in respect of divorce a *mensa et toro*, and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise, except so far as relates to the granting of marriage licenses, which may be granted as if this Act had not been passed. Section 32 enacts that when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply, by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. It will thus be seen that where the parties are Christians, such as is the case here, a decree for restitution of conjugal rights can be granted only by the District Court or the High Court on the petition of the husband or the wife, as the case may be. It will also be seen that S. 4 of the Act distinctly provides that jurisdiction in respect of divorce and in all other causes, suits and matters matrimonial shall be exercised by such Courts and by the District Courts subject to the provisions of the Act and not otherwise. It is, therefore, clear that in the present case the Sub-Judge, 4th Class, had no

jurisdiction to entertain the suit. The Indian Divorce Act creates, in certain circumstances a right in the husband or the wife to apply for restitution of conjugal rights and points out the method of enforcing the same right It is well settled that where a right is created by statute and a method of enforcing the right or of re dressing grievance caused in the exercise or en forcement of right is pointed out by the statute creating such right then the general remedy of suit as provided by S 9 Civil P C will be impliedly barred We must, therefore find that the suit in the present case is excluded from the cognizance of the ordinary Civil Courts by the Indian Divorce Act It follows that the Sub Judge acted without jurisdiction

[6] For the aforesaid reasons we set aside the order of the Sub Judge accept this revision petition with costs and direct that the plaint be returned to the plaintiff respondent for presen tation to the proper Court Pleader s fee Rs 16 Orders announced

D H *Revision allowed*

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**A I. R (34) 1947 Peshawar 55 [*C N 22*]**

MOHD IBRAHIM J C AND RAM LABHAYA J

*North West Frontier Province Government through Collector Peshawar—Defendant — Appellant* v *Sm Radha Devi and others— Plaintiffs—Respondents*

Appeal No 14/6 of 1947, Decided on 30-5 1947 from judgment and decree of Addl Judge Peshawar D/ 10 10-1946

(a) Civil P C (1908) S 2 (2)— Order of remand under S 151 when decree—Civil P C Ss 100 and 151

Where an appellate Court without itself deciding any of the points in controversy in the suit merely sets as de the decree of the trial Court and remands the

(44 Com) C P C S 2 (2) N 6 pt 6, S 100 N 8 pt 2 S 151 N 9 pt 3 O 41 R 23 N 22 pt 8

(b) Civil P C (1908) S 115 — Order of remand under S 151 — Appeal from it can be treated as revision

Where the appellate Court in the exercise of juris diction vested in it under S 151 remands a case and the order is not vitiated by any error of law no use ful purpose will be served by treating the appeal from such order as a revision petition [Para 13]

(44 Com) C P C S 115 N 19

*Cases referred* —

1 (40) 27 A I R 1940 Nag 349 I L R (1940) Nag 538 191 I C 566 Sheolal Balmukand v Jugal Kishore

2. (41) 28 A I R 1941 Cal 446 195 I C 864 Gopal Chandra v Dwarka Nath

3 (26) 13 A I R 1926 Pat 457 6 Pat 160 97 I C 107 Permanand Kumar v Bhon Lohar

4 (35) 22 A I R 1935 Pat 49 154 I C 859 Halima Khatun v Abdul Majid

5 (42) 29 A I R 1942 Pat 195 197 I C 13 Pradyat Kumara v Jyotish Chandra

6 (23) 10 A I R 1923 Cal 606 74 I C 1038, Bhairab Chandra v Kali Kumar

*Peer Bakhsh Khan*—for Appellant

*R S Dewan Charanjit Lal*—for Respondents

**Ram Labhaya J** —This is a further appeal by the Government of the N W F Province, from an order of the Addl Judge, Peshawar by which the order of the trial Court granting plaintiff respondents a decree as prayed for by them was reversed and the case was remanded to the trial Court under S 151 Civil P C for a fresh decision after a *de novo* trial

[2] Plaintiff respondents are the legal repre sentatives of Mt Radha Devi who instituted the suit out of which this appeal has arisen By this suit she claimed possession of a site measur ing 2362 square feet and a perpetual injunction against the defendant restraining it from inter fering with her possession of another site measuring 13750 square feet The N W F P Government (defendant) resisted the suit on several grounds

[3] The following issues were framed

1 Whether the suit is bad for misjoinder of causes of action?

2 Whether the plaint was in accordance with the notice and if not whether the suit in the present form was competent?

3 Whether the suit was properly valued for purposes of jurisdiction and court fee?

4 Whether plaintiff was in possession of the land measuring 13750 sq feet and a suit for injunction was competent?

5 Whether the two plots of land in suit are the pro perty of the plaintiff?

6 Whether defendant is in adverse possession of the two plots in suit?

7 Relief

[4] On issue No 3, it was held by the trial Judge that the proper value of land of which possession was sought by the plaintiff was Rs 2 221, and not Rs 1,000 as fixed by the plain tiff Deficient court fee was made good as ordered by the Court The second prayer in the suit which was for a perpetual injunction was held to have been correctly valued The other issues in the case were found in plaintiffs' favour The claim, therefore was decreed in favour of the

[5] The defendant appealed from the order of the learned trial Judge (Senior Sub-Judge, Peshawar) The learned counsel lant did not question the find Court on issue No 1 The dropped Findings on

[6] The learned Addl. Judge after a careful consideration of the argument addressed to him came to the conclusion that the main issue in the case concerning title to the two properties in suit could not be decided in a satisfactory manner on the basis of the material available on the record. He felt the same difficulty about other important questions arising in the case, and came to the conclusion that further inquiry in the case was essential in order to come to a correct conclusion on the questions arising in the case. He, therefore, reversed the decree in favour of the Plaintiffs and remanded the case under S. 151, Civil P. C. to the trial Court for a trial *de novo* with the direction that parties may be permitted to produce evidence in the light of the remarks made by him in his order.

[7] The defendant has assailed the order of the learned Addl. Judge by a further appeal. It is contended by the learned counsel for the respondents that no further appeal is competent in the case. The order of the learned Addl. Judge was passed under S. 151, Civil P. C. and orders passed under that section are not made appealable by the Code.

[8] The learned counsel for the appellant on the other hand points out that orders under S. 151, Civil P. C. would not be appealable if they do not fall under S. 2 (2), Civil P. C. If any order under S. 151 amounts to a decree by reason of the fact that it embodies a final adjudication on the rights of the parties with regard to some or all of the matters in controversy, the order will be appealable as a decree. The order in question, he contends, fulfils these requirements.

[9] It is true that an appeal would lie from an order of remand, if it amounts to a decree within the meaning of S. 2 (2), Civil P. C. The correctness of this proposition of law has not been questioned by the learned counsel for the respondents. It also finds ample support from authority. In A. I. R. 1940 Nag. 319[1], it was held that there could be no appeal from an order of remand unless it fell under O. 41, R. 23, Civil P. C. or unless it could be said to amount to a decree within the meaning of S. 2 (2), Civil P. C. The same view was expressed in A. I. R. 1941 Cal. 446,[2] A. I. R. 1926 Pat 457,[3] and other subsequent decisions from the Patna High Court.

[10] The question that arises for determination, therefore, is whether the order of remand passed by the learned Addl. Judge can be held to be a decree within the meaning of S. 2 (2), Civil P. C.

[11] As shown above, the order does not purport to decide any single question arising between the parties. The contest, so far as issue No. 1 was concerned, was dropped on behalf of the defendant appellant. So far as the other issues are concerned, the learned Judge gave no decision. He merely reversed the decree in favour of the plaintiff respondents, and directed a fresh trial of the suit in the light of the remarks made by him in the judgment. In order that the remand order may be covered by S. 2 (2), Civil P. C. it is necessary that it should embody a formal expression of adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matter in controversy in the suit. The order in question does not purport to determine conclusively the rights of the parties on any matter in controversy. The learned Judge did not try to determine these rights either conclusively or otherwise. All that he has done is to hold that the rights of the parties cannot be decided until some more material is brought on the record. He has, therefore, in express terms left all matters in controversy undecided. In these circumstances the order of remand cannot be said to be covered by S. 2 (2), Civil P. C. The mere fact that by it a decree passed in plaintiffs' favour was reversed would not suffice to bring it within the ambit of S. 2 (2), Civil P. C. It was held in A. I. R. 1926 Pat. 457,[3] that though an order of remand under S. 151, Civil P. C. is appealable, if it amounts to a decree, it would not be subject to appeal if it merely sets aside the decree of the trial Court and does not itself decide any of the points raised for determination, or does not determine the rights of the parties with regard to any of the matters in controversy in the suit. This case was followed in A. I. R. 1935 Pat. 49,[4] where the view, that an order of remand which merely sets aside the decree of the trial Court and does not itself decide any of the points raised for determination cannot amount to a decree, was reaffirmed. The view of law taken in A. I. R. 1926 Pat. 457[3] was also approved in A. I. R. 1942 Pat. 195.[5] This view gives full effect to the language of the section. What is needed is an ajudication on the rights of the parties. If the reversal of a decree is possible without adjudication on the rights of the parties in controversy, the order cannot possibly be said to be covered by S. 2 (2), Civil P. C. We find ourselves in full agreement with the view taken in these cases.

[12] The learned counsel for the appellant has, however, relied on A. I. R. 1923 Cal. 606[6]. In this case the Subordinate Judge had dismissed the suit. Upon appeal plaintiffs asked for permission to adduce in evidence an entry in the record of rights which had been finally published long after the decree had been made by the trial Court. The District Judge came to the conclusion that before the matters in defference were finally decided, the entry in the record of rights should

no difficulty will arise, because heads of Departments or public officers are not expected to act capriciously and ordinarily the Court will accept their statement If necessary, the Court will require the officer to claim the privilege in the manner indicated in the judgment of Lord Blanesburgh in the *Australian case* If, however the Court finds that an over zealous officer is capriciously putting forward a claim of privilege, the Court will decide, as best as it can, by the means available to it whether the claim is well founded "

[22] No questions relating to the construction of Ss 123, 124 and 162, Evidence Act are now before me, and it is unnecessary to make any comments with reference to the conclusions arrived at by Das J I have referred to what he has said to indicate what, in my opinion, are some of the difficulties in accepting as binding in India the decision in 1931 A C 704[11] Many of the Courts in India have frequently given an interpretation to the expression "unpublished records relating to any affairs of state" within the scope of which would probably not be included some of the documents which according to the decision in 1942 ALL E R 587[1] might be regarded as privileged documents on the ground of public interest In 47 C W. N 928[14] Das J has in the following passage referred to some of these decisions

Thus it has been held by Holmwood and Sharfuddin JJ, in 16 C W N 431,[15] that statements made by witnesses in the course of a Departmental enquiry into the conduct of Police Officers who were

[23] In 1942 1 ALL E R. 587[1] the Lord Chancellor referred to a number of English cases in which documents of the nature of some of those mentioned by Das J, were held privileged Viscount Simon said

"It will be observed that the objection is sometimes based upon the view that the public interest requires a particular class of communications with or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation, rather than upon the contents of the particular document itself Several cases have been decided on this ground protecting from production



Lord Lyndhurst L C said at page 55

'Now it is quite obvious that public policy

of a particular individual, those communications should be subject to be produced in a Court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious guarded and reserved, I think, therefore, that these communications come within the class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the Act of Parliament and without injury to the public interests'

On the same principle it has been held in H M S Bellerophon (1874) 44 L J Adm 5[22] that where a collision occurs between a ship of the Royal Navy and a ship belonging to a private owner, the Admiralty cannot be required to produce the report made by the officer who is in command of the former ship Another example is the view which has been taken that the reports made by a police officer to his superior as to a street accident are protected from production though requested by a party to subsequent litigation for fixing liability between private individuals, *see* (1890) 28 Sel L R 207[23] 1909 S C 244[24] and (1933) 150 L T 256[25] The practice in the metropolitan police district is, I believe, in the case of a street accident where no criminal proceedings are being taken, to provide on the application of persons interested in a possible civil claim an abstract of any report that has been made by the policeman on the spot to his superiors, including the names of witnesses so far as known to the police This seems an admirable way of reconciling the requirements of justice with the exigencies of the public service The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld This test may be found to be satisfied either (a) by having regard to the contents of the particular document or (b) by the fact that the document belongs to a class which, on ground of public interest, must as a class be withheld from production "

[24] In particular I refer to (1890) 28 Sel L R 207[21] and 1909 S C 244,[23] in which reports made by a police officer to his superior as to a street accident were protected from production though requested by a party to subsequent litigation for fixing liability between private individuals. In many of the Indian decisions, documents relating to affairs of State or matters of State have been regarded as mainly political communications made in fulfillment of public political duties But as has been pointed out in 1931 A C 704,[11] the privilege is not restricted to this class of documents Lord Blanesburgh said in that case

"As the protection is claim principle of State policy and fu

papers protected, as might have been expected have usually been public official documents of a political or administrative character. *Yet the rule is not limited to these documents. It's foundation is that the information cannot be disclosed without injury to the public interests* and not that the documents are confidential or official, which alone is no reason for their non-production; *see* (1916) 1 K. B. 822[26] at p. 829, 830 and (1841) 1 Ph. 562[27]. A contrast, very apposite in the present case, between State documents which are readily within the rule and other documents of the same State which, presumably, are outside it, is drawn in the case of (1856) 8 De. M. & G. 182[21] so frequently cited from another angle. Turner L. J. in the course of his judgment there, says at p. 189:

'My learned brother has already read ....... the passage contained in the answers with reference to the nature of the documents now sought to be protected. It is sufficient to say that they are stated ....... to be political communications which, in fulfilment of the public political duties of the East India Company and of their several Governments in India have passed between them and their Governments respectively solely with a view to the good Government of India and to the performance of a public duty. The question which has been suggested in the argument as to contracts between the East India Company and any railway subscribers with reference to the formation of a railway has nothing to do with a question relating to the public Government of India and the *performance* of the public duty of the Company. To such a question it is unnecessary to refer because it is perfectly distinguishable from that before the Court.

*It must not be assumed from these observations of the Lord Justice that documents relating to the trading commercial or contractual activities of a State can never be claimed to be protected under this head of privilege.* It is conceivable that even in connection with the production of such documents there may be some plain overruling principle of public interest concerned which cannot be disregarded.' But the cases in which this is so must, in view of the sole object of the privilege, and specially in time of peace, be rare indeed and the distinction drawn by the Lord Justice remains instructive and illuminating. In view of the increasing extension of State activities into the spheres of trading business and commerce and of the claim of privilege in relation to liabilities arising therefrom now apparently freely put forward, his observations stand on record to remind the Courts, that while they must duly safeguard genuine public interests, they must see to it that the scope of the admitted privilege is not, in such litigation, extended."

[25] At some future time, it may be necessary to attempt to co-ordinate the law as to the claim of privilege by the Crown in respect of documents relating to affairs of State, at the two stages when the claim may arise. I am at present only concerned with the claim put forward by the Crown at the first stage and it is my view, for the reasons stated above, that the principles stated in 1942-1 ALL. E. R. 587[1] are applicable to production of documents in India under O. 11, R. 19 of the Civil P. C. that is to say, that documents otherwise relevant and liable to production need not be produced if owing to their actual contents, or the class of documents to which they belong, the public interest requires that they should be withheld; and that an objection to the production of documents duly taken by the head of a Government department should be treated by the Court as conclusive. There next arises the question as to whether circumstances have been made out in this case to support the claim of the Crown. On 9th February 1945 the plaintiffs made an application for discovery on oath under O. 11, R. 12, Civil P. C. On 10th August an affidavit of documents was filed on behalf of the Crown purporting to be under O. 11, R. 13, Civil P. C. In this the Crown took objections to producing of certain specified documents on the ground that "they are privileged documents." This affidavit did not fully conform to the prescribed form No. 5 in Appendix 'C' of Civil P. C. The Crown did not specify the grounds upon which the privilege was claimed. No objection was, however, taken by the plaintiff to the affidavit on this ground, but an objection was taken on the ground that insufficient details of the documents had been supplied. The affidavit was sworn by one Lalchand Bhopatrai Tejwani, a clerk in the office of the Divisional Superintendent, North Western Railway, Karachi. The defendant was directed by the Registrar (O.S.) to give further particulars of the documents, and in another affidavit by the same deponent, Lalchand, sworn on 31-8-1945, the required details were given. The documents of which inspection is sought may be divided under the following heads: (i) certain books and records relating to the loading and despatch of goods, including sealing books and message books of certain specified dates extending over several months; (ii) the correspondence carried on by the Divisional Superintendent of the North Western Railway, Karachi, with subordinates regarding the cause of the fire to the tankwagon carrying the consignment in suit; (iii) the statment of some 25 persons recorded at an official enquiry into the destruction of the wagon; the report of a railway officer regarding the event and the report of an Enquiry Committee.

[26] Mr. Choithram for the Crown concedes that no affidavit fulfilling the necessary conditions has been filed; but he says that no objection to the affidavit filed by Lalchand was taken, and he argues that he should now be given an opportunity to file a proper affidavit which will fulfil the conditions laid down in (1942) 1 ALL E. R. 587.[1] Having given this matter my consideration, I consider the Crown should be given an opportunity to file a proper affidavit. With regard to who the deponent should be, it is not for the Court to give directions. This is a matter to be considered by the legal advisers of the Crown and any objections as to the status of the deponent will have to be considered at the proper time. It was suggested that the General Manager

of the North Western Railway would be the proper person and the Secretary of the Railway Board was also mentioned I would only say that in deciding this matter regard might be had to the uniformity of practice There are various Sate railways in India under the Control of the Railway Board *and it would be desirable that* these railways should adopt a uniform policy in a matter of this nature

[27] A good deal of argument came from Mr Manghanmal with reference to the nature of the documents in this case, in respect of which privilege is claimed Mr Manghanmal said that none of these can be regarded as privileged, that they are purely documents relating to the commercial transactions of the railway Mr Choithram on the other hand relied on the observations of Viscount Simon in 1942 1 ALL E R 587,[1] to the effect that the public interest sometimes requires a particular class of communications with or within a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation, rather than upon the contents of the particular documents themselves I have referred to the *observations in 1931 A. C 704*[11] to the effect that in certain circumstances documents relating to the commercial transactions of the Crown might be privileged I think it is sufficient to leave the matter there I direct that the Crown is at liberty to file the necessary affidavit within two months from this date, and thereafter the matter may be referred to me for final orders

[28] Mr. Choithram also urges two other grounds of objection to production of the documents for inspection He says that they constitute his evidence and come within the doctrine of legal professional privilege He relied in this connection upon (1878) 8 Q B. D 315,[27] in which it was held that documents prepared in relation to an intended action, whether at the request of a solicitor or not and whether ultimately laid before the solicitor or not are privileged if prepared with a *bona fide* intention of being before him for the purpose of taking his advice, and an inspection of such documents cannot be enforced Mr Choithram stated that the documents in this case come exactly within that authority. He also relied on 1930 W. N 26[28] The facts of the latter case are similar to the present case The documents in respect of which privilege was claimed included an official report as to a railway accident and there is no doubt that that decision supports Mr. Choithram in many respects, but the difficulty in Mr Choithram's way is that there is no affidavit or other materials on the record to substantiate his contention Mr Choithram has asked permission to file an affidavit with regard to this matter also, and I accede to his request If he wishes to pursue the question of privilege on these grounds he is at liberty to file an affidavit or affidavits in respect of this contention within two months from this date

G B /D H *Order accordingly.*

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## A I R (34) 1947 Sind 163 *[C N 68]*

THADANI J

*Abba Ali Mahomed — Plaintiff* v *Mulraj Gupta and another —Defendants*

Suit No 2 of 1946 Decided on 21 8 1946

(a) Transfer of Property Act (1882) S 108 (j)—Sub-lease and assignment — Distinction — Sub lease is transfer of whole or part of lessee s interest — Assignment is transfer of whole interest in property — Sub-lease even of whole interest does not amount to assignment — No privity of contract or estate is created between sub-lessee and superior landlord

The distinction between a sub lease and an assignment is clear In a sub lease, the whole or any part of the lessee s interest can be transferred whereas in an assignment the whole of the interest in the property must be transferred. Even if the whole of the lessee s interest is sub demised, the sub lease does not operate as an assignment and hence there is neither privity of contract nor privity of estate between the sub-lessee and the superior landlord 17 A I R 1930 P C 59, *Rel on*, 26 A I R 1939 P C 14, 28 A I R 1941 P C 36 and 18 A I. R 1931 Lah 614, *Ref*, 29 Bom 391 12 A I R. 1925 Bom 330 12 A I R 1925 Sind 296 17 Mad 296 and 12 A I R 1925 Cal 423, *held no longer good law* [Paras 4, 6, 10]

(45 Com) T P Act S 108 (j), N 5 pts 1, 2, 3

(b) Civil P C (1908) O I, Rr 3 and 10—Suit for rent or mesne profits and possession of demised premises—Possession with sub-lessee—Sub-lessee is necessary party for relief of possession though not for rent or mesne profits

Joinder of a sub-tenant by a superior landlord cannot be regarded as unnecessary in every case It depends upon the nature of the relief sought against the lessee himself [Para 12]

*A* leased his property to *B* who sub let it to C. *B* died and was succeeded by his father *D* who was not in possession of the leased property *A* sued for rent or mesne profits and for possession of the property joining *C* and *D* as defendants On objection that C was not a necessary party

*Cases referred —*

1 (30) 17 A. I R 1930 P C 59 57 I A. 110 57 Cal 1176, 122 I C 20 (P C), Hemraj v Beny Lal Sen.
2 (39) I L R 1939 Kar P C 78 66 I A 50 26 A I R 1939 P C 14 I L R (1939) 1 Cal 282 179 I C 329 (P C), Ramkinkar Banerjee v Satya Charan

3. ('41) I. L. R. (1941) Kar. P. C. 66 : 28 A. I. R. 1941 P. C. 36 : 20 Pat. 521 : 68 I. A. 67 : 193 I. C. 890 (P. C.), Jagdamba Loan Co., Ltd. v. Shiba Prasad Singh.
4. ('31) 18 A. I. R. 1931 Lah. 614 : 131 I. C. 121, Jethanand v. Udhow Das.
5. ('05) 29 Bom. 391, Vithal Narayan v. H. H. Raje Bahadur Shriram Savant.
6. ('25) 27 Bom. L. R. 553 : 12 A. I. R. 1925 Bom. 330 : 88 I. C. 79, Ardeshar Cawsji v. K. D. & Bros.
7. ('25) 12 A. I. R. 1925 Sind 296 : 87 I. C. 802, Gobindram Uttamchand v. Mohamed Hussain.
8. ('94) 17 Mad. 296, Kunhanujan v. Anjelu.
9. ('25) 12 A. I. R. 1925 Cal. 423 : 79 I. C. 557, Manmatha Nath Chowdhury v. Nalinaksha Rai.
10. ('97) 21 Bom. 311, Timmappa Kuppaya v. Rama Venkanna Naik.
11. ('45) 32 A. I. R. 1945 Bom. 237 : I. L. R. (1945) Bom. 310 : 219 I. C. 72 (F. B.), Mangaldas Girdhardas v. Govindlal Ishwarlal.

*Dingomal Narain Singh*—for Plaintiff.
*Tara Chand Khimandas*—for Defendant 2.
*Defendant 1 in person.*

**Judgment.**— This is a suit by one Abba Ali Mahomed for ejectment and arrears of rent and mesne profits against two defendants. Defendant 1 is the heir and legal representative of his deceased son Ruplal Mulraj who was the lessee of the plaintiff. Defendant 2 is the sub-lessee of Ruplal Mulraj. The plaintiff owns a building bearing S. No. 188, sheet O. T. 9, Old Town Quarter, Karachi. On the ground floor of this building is a shop which was let to Ruplal Mulraj the deceased son of defendant 1, on a monthly rental of Rs. 25. On 26-3-1945, the deceased Ruplal Mulraj sub-let the shop to defendant 2, alleged to be without the consent of the plaintiff and contrary to the provisions of the Sind Rent Control Order, 1943. On 2-4-1945, the plaintiff served a notice on Ruplal Mulraj to vacate the shop and to hand over vacant possession to him. A copy of this notice was also served on defendant 2. After obtaining the necessary certificate from the Rent Controller, the plaintiff filed the present suit on 22-12-1945. The plaint was however admitted on 9-1-1946. Before the institution of the suit the lessee Ruplal Mulraj died, and his father Mulraj Gupta has been sued as the heir and legal representative of his deceased son.

[2] Defendant 1 filed his written statement on 21-2-1946, but at the hearing he stated that he did not propose to contest the suit and that he had no objection if a decree was passed against him for claim, and costs against, the estate of the deceased Ruplal in his hands, and intimated to the Court that the deceased Ruplal has left no estate.

[3] Defendant 2 filed a written statement covering fourteen paragraphs. It is not necessary to refer to all the pleas raised in the written statement as Mr. Tarachand who appears for defendant 2, has made a statement that he gives up all issues except Nos. 11 and 12. Issues 11 and 12 read as follows :

> "11. Is defendant 2 necessary party to the suit ?
> 12. Is defendant 2 liable to pay rent and / or mesne profits to the plaintiff ? If so, at what rate and what amount ?"

[4] *Issue 12.*—Mr. Tarachand contends that as defendant 2 was a sub-lessee of the lessee Ruplal, there was neither privity of contract nor privity of estate between the plaintiff and defendant 2. Mr. Tarachand relies upon the decision of the Privy Council in A. I. R. 1930 P. C. 59 : 57 I. A. 110,[1] where Sir John Wallis delivering the judgment of the Board observed :

> "There is therefore no ground for the contention that in India a sub-lease for the unexpired residue of the term operates otherwise than as a sub-lease."

In this case the lease was from month to month, and there is nothing in the lease to suggest any contract to the contrary. The distinction between a sub-lease and an assignment appears to be clear enough. In a sub-lease the whole or any part of the lessee's interest can be transferred, (*vide*, S. 108, T. P. Act,) whereas in an assignment the whole of the interest in the property must be transferred. Nor indeed does it follow that where the whole of the lessee's interest is sub-demised, the sub-lease is an assignment; it is nevertheless a sub-demise as their Lordships of the Privy Council have observed. The question arises whether in a case of sub-demise, there is privity of estate between the superior landlord and the sub-tenant. This aspect of the case, but with reference to a mortgage created by a lessee, was considered by their Lordships of the Privy Council in I. L. R. (1939) Kar. (P. C.) 78 : 66 I. A. 50.[2]

[5] In a subsequent case, I. L. R. (1941) Kar. (P. C.) 66,[3] Sir George Rankin delivering the judgment of the Board observed :

> "They (their Lordships of the Privy Council) are not of opinion that privity of estate can result from entry into possession in the case of a person who has taken a transfer from the lessee of an interest which is not the whole interest in the term."

[6] Mr. Dingomal relying upon this decision has contended, that where the whole of the lessee's interest is sub-demised, as in this case, the sub-demise operates as an assignment. I do not think that that is a correct interpretation of their Lordships' decision, for a sub-demise may be a transfer of the whole of the lessee's interest or only a part of it; in either case, it is a sub-demise and not an assignment : *vide* 57 I. A. 110.[1] It cannot be suggested that the view taken in that case is in any way affected by the particular observation of Sir George Rankin in I. L. R. (1941) Kar. (P. C.) 66.[3]

[7] The only case which has been brought to my notice by Mr. Tarachand, and which has a direct bearing upon the facts of this case, is the

case in A I R 1931 Lab 614,[4] where Addison J held that a superior landlord must fail in a suit against the sub lessee for want of privity of contract It is true that the question of the privity of estate was not considered in that case, but it is reasonable to suppose that the learned Judge did not think that the question of the privity of estate could possibly arise in view of S 108 (j), T P Act

[8] Turning to the relevant sections of the Transfer of Property Act it seems to me that where there is a sub demise the question of privity of estate between the superior landlord and the sub tenant cannot possibly arise For instance, under the definition of 'lease," in S 105, T P Act the superior landlord may fix the cosideration for the lease a share in the crops or service or any other

or service or any other thing of value, but for money If, then the contention that in the case of sub demise of the whole of the lessee's interest there is privity of estate between the superior landlord and the sub tenant were to be accepted, the sub tenant would be liable to the superior landlord not for money, but for a share in the crops or service or any other thing of value in accordance with his terms of the contract with the lessee Privity of estate must come into existence in all cases uniformally whether or not the whole of the lessee's interest is sub demised and not cease to have effect where, for instance, the consideration of a lease is different to that of a sub lease

[9] Mr Dingomal for the plaintiff has relied upon the case in 29 Bom 391[5] I do not think the law laid down in that case is good law in view of the decision of the Privy Council in 57 I A 110[1] For the same reason, the view taken in the following cases must be regarded as of doubtful value 27 Bom L R 553[6] A I R 1925 Sind 296[7] 17 Mad 296,[8] A I R 1925 Cal 423[9]

[10] The observation of Farran C J in 21 Bom 311[10] at p 314, that "an assignee of a lease is of course in a different position, for, he is brought by his assignment into direct relations with the landlord," *is in my opinion, obiter, and* does not accord with the decision of the Privy Council in 57 I A 110[1] My finding accordingly on issue No 12 is in the negative

[11] *Issue 11* —This issue has been raised presumably on the strength of the decision in A I R 1945 Bom 237[11] But that was a case where a sub-lessee himself sought to be joined as a party and he was held not to be a necessary party on the facts of that case The position in this case is different Here the plaintiff himself has joined defendant 2 as a party The question for my consideration is not whether a sub tenant has a right to be joined as a party, but whether a landlord has a right to join a sub tenant This question must be answered with reference to the facts of a particular case

[12] It is not in every case that a joinder of a sub tenant by the superior landlord must be regarded as unnecessary It depends upon the nature of the relief sought against the lessee him self In this case the lessee is dead, and his legal representative who is not in possession of the property in suit has been sued along with defendant 2 It is obvious that if the landlord had not joined defendant 2 he could not have obtained a decree for possession against the legal representative of defendant 1, because admittedly he is not in possession Defendant 2 is not liable for rents and mesne profits and the question, therefore, of the landlord executing the decree against the sub tenant, namely, defendant 2 in this case would not have arisen He would then have to file a suit for recovery of possession against defendant 2 To avoid multiplicity of suits the plaintiff in this case, in my opinion, rightly joined defendant 2 as a party for the purposes of a relief as to possession but not for the purposes of relief as to rent or mesne profits

[13] There is a passage in the judgment of Rupchand A J. C in A I R 1925 Sind 296[7] which deals with the question of joinder of a sub tenant Rupchand A J C was of the opinion that a sub tenant could be joined My finding accordingly, on issue 11 is in the affirmative

[14] The result is that there will be a decree for possession only against defendant 2 with costs Defendant 2 will be entitled to his costs from the plaintiff as regards the relief as to rents and mesne profits in which the plaintiff has failed There will be a decree for Rs 225 as arrears of rent and Rs 17 8 0 for mesne profits upto the date of suit and further mesne profits from the date of suit till possession at the rate of Rs 25 p m and costs of the suit against the estate of the deceased Ruplal in the hands of defendant 1

D R *Order accordingly*

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**A I R. (34) 1947 Sind 165** *[C. N 59]*

DAVIS C J AND THADANI J

*Tejumal s/o Naraindas — Appellant* v

Hindu Law — Succession — Bandhus of same class and equal degree of propinquity — Test of nearness of line has to be applied — *Descendants* of father of propositus are preferred to descendants of grand ero *opositus*

As betw dhus of the same class and of equal d lculated d o the

made sanctioned by Hindu law, those in the nearer line exclude the more remote. Where the contest is between bandhus of the same class, standing in equal degree of propinquity to the propositus, those who are descendants of the father of the propositus are nearer in blood to the propositus than those who are the descendants of the grandfather of the propositus, and the *former are entitled to succeed in preference to the* latter: 18 A. I. R. 1931 P. C. 268, *Disting.*; 30 A. I. R. 1943 All. 87; 16 Mad. 23 and 19 Mad. 405 (PC). *Rel. on.* 25 A. I. R. 1938 P. C. 34 and 9 A. I. R. 1922 P. C. 33, *Ref.* [Paras 6 & 9]

*Cases referred:—*

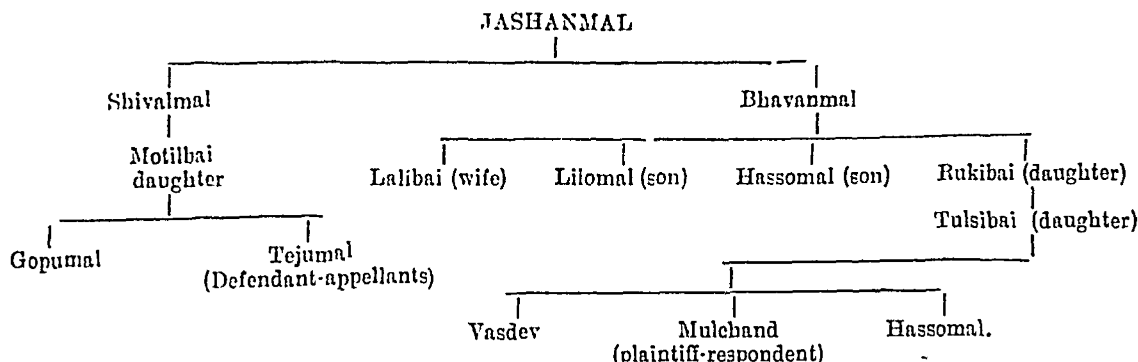
1. ('31) 58 I. A. 372 : 18 A. I. R. 1931 P. C. 268 : 59 Cal. 576: 135 I. C. 637 (P. C.), Jatindra Nath v. Nagendra Nath.
2. ('43) I. L. R. (1943) All. 155: 30 A. I. R. 1943 All. 87: 206 I. C. 81, Mt. Sabodra v. Shri Thakur Behariji Maharaj.
3. ('21) 44 Mad. 753 : 9 A. I. R. 1922 P. C. 33 : 48 I. A. 349 : 64 I. C. 402 (P.C.), Vedachala Mudaliar v. Subramania Chattiar.
4. ('38) I. L. R. (1938) Mad. 551: 25 A. I. R. 1938 P. C. 34: 65 I. A. 93: 32 S. L. R. 328: 172 I. C. 724 (P. C.), Balasubrahmanya v. Subbayya.
5. ('93) 16 Mad. 23, Muthusami v. Muthukumara Sami.
6. ('96) 19 Mad. 405 : 23 I. A. 83 : 7 Sar. 45 (P. C.), Muthusami Mudaliar v. S. Muthukumarasami Mudaliar.

*G. Raymond*—for Appellant.
*Tikamdas Bassarmal*—for Respondents.

**Thadani J.**—This is a second appeal from the decision of the learned Assistant Judge Sukkur who upheld the decision of the Joint Subordinate Judge of Shikarpur, decreeing the plaintiff-respondents' suit No. 572 of 1938 for a declaration involving succession to the estate of one Lilomal and Hassomal. The question of law involved in this appeal arises from the following facts: One Jashanmal died leaving two sons Shivalmal and Bhavanmal. Shivalmal died leaving a daughter named Motilbai. Motilbai has two sons, Gopumal and Tejumal who are the defendant-appellants. Bhavanmal died leaving a widow and two sons Lilomal and Hassomal, and a daughter Rukibai. Rukibai had a daughter Tulsibai. Tulsibai had three sons Vasudev, Mulchand and Hariomal, the *plaintiff-respondents*. Lilomal and Hassomal are *dead*. The rival claimants are governed by the *Mitakshara* School of Hindu Law.

[2] On 27-11-1938 the respondents filed a suit in the Subordinate Civil Court of Shikarpur in which they claimed to be the owners of a residential house bearing registered No. 428, Sheet No. 12 situated in the City of Shikarpur as heirs of Lilomal and Hassomal. The property originally belonged to Bhavanmal, a son of Jashanmal. After the death of Bhavanmal, the property descended to his two sons, Lilomal and Hassomal. After the death of Lilomal and Hassomal, the property was in the possession of their mother Mt. Lalibai. Lalibai died on 13-10-1928.

[3] It appears that in 1930 a dispute arose between the descendants of Bhavanmal on the one hand and the descendants of Jashanmal on the other. Tulsibai, the grand-daughter of Bhavanmal, filed a suit against Motilbai the grand-daughter of Jashanmal, in which she claimed to be the heir of the deceased Lilomal and Hassomal. Tulsibai's suit was dismissed. She filed an appeal in which she succeeded and it was declared that Tulsibai was the heir of the deceased Lilomal and Hassomal. Gopumal and Tejumal, however, obstructed Tulsibai in obtaining possession of the property, whereupon Tulsibai filed another suit, being No. 335 of 1935, under the provisions of O. 21, R. 103, C. P. C. She succeeded in the trial Court, but in appeal Tulsibai's suit was dismissed and Gopumal and Tejumal were declared to be the heirs of the property left by Lilomal and Hassomal. The present suit No. 572 of 1938 has been filed by the three sons of Tulsibai against Gopumal and Tejumal. The *following is the geneological table.*




[4] Mr. Raymond for the appellants contends that as the appellants and the respondents stand to the deceased Lilomal and Hassomal in the same degree of propinquity, the appellants are to be preferred to the respondents because the appellants are in a position to confer greater spiritual benefit upon the deceased Lilomal and Hassomal and his ancestors than the respondents. In support of his contention he has relied upon the decision of the Privy Council in 58 I. A. 372.[1] But we do not think thed ecision of their Lordships in 58 I. A. 372[1] governs the

facts of the present case Before us the con testing heirs are the descendants of the father of the propositus on the one hand and the descendants of the grandfather of the pro positus on the other It is true that in the matter of the degree of propinquity calculated according to the mode sanctioned by Hindu law the contesting claimants are in the fourth degree of propinquity to the propositus But in the matter of propinquity of blood the respon dents are nearer to the propositus than the appellants The mode sanctioned by Hindu law for determining the degree of propinquity to the propositus is this First trace the common ancestor of the propositus and one set of con testing heirs, the common ancestor is placed in the first degree and each of the descending generations is placed in the second third and the fourth degree and so on Then trace the common ancestor of the propositus and the other set of contesting heirs and assign to them degrees in the same way

[5] In 58 I A 372[1] the contesting heirs were in the third degree of propinquity to the pro positus calculated in the manner indicated above But as regards the propinquity of blood their Lordships negatived the contention that as under the Mitakshara mother is regarded as the nearer heir to her son than the father those related through the mother are (when the degrees of descent are equal) to be regarded as nearer in blood than those related through the father In their Lordships opinion it did not follow that the preference accorded by a special test to the mother should also apply to the mother s bandhus

[6] The above case is then authority for the proposition that where there is contest between bandhus of equal degree of propinquity to the propositus and equal in the line of descent those who are able to confer greater spiritual benefit upon the propositus are to be pre ferred to those who are not so able In the case before us the contest is between Bandhus of the same class standing in equal degree of propinquity to the propositus but the respon dents who are descendants of the father of the propositus are nearer in blood to the propositus than the appellants who are the descendants of the grandfather of the propositus In I L R (1913) ALL 155[2] Bajpai and Dar JJ had occasion to consider the rival claims of contesting atma bandhus placed in exactly the same position as the rival claimants in the case before us The rival claimants in that case stood as here in the fourth degree of propinquity to the propositus Het Ram But Inder Mohan and Shyam were nearer in blood to Het Ram than Gokal Chand, Mool Chand and Bhagwan Das Inder Mohan and Shyam were the descen dants of the father of Het Ram whereas Gokal Chand, Mul Chand and Bhagwan Das were the descendants of the grandfather of Het Ram The descendants of the father were preferred to those of the grandfather

[7] The order of succession among bandhus governed by the Mitakshara law has been settled by the Privy Council as resting upon consanguinity or nearness of blood It is only when this test fails and the contesting bandhus are equal in degree of propinquity to the pro positus that the test of religious efficacy is adopted In 44 Mad 753[3] and I L R (1938) Mad 551[4] the claimant preferred was nearer in degree to the propositus and in 59 Cal 576[1] the claimants were in equal degree of propin quity to the propositus and there was no inequa lity in the degree of descent and the test of religious efficacy was adopted

[8] Mr Raymond s contention is based upon a confusion of two distinct positions Equality of degree of propinquity calculated according to the particular method sanctioned by Hindu law is something quite different from the equa lity in the line of descent If this distinction is borne in mind the observations of Sir Muttu sami Ayyar in 16 Mad 23[5] which were approved by the Privy Council in 19 Mad 405[6] and affirmed by their Lordships in 44 Mad 753[3] are clearly applicable to the facts of the pre sent case Sir Muttusami Ayyar observed

> Though sons born in the family are all gotrajas yet the Mitakshara regulates the succession when there is competition between them with reference to the nearness or remoteness of propinquity as for
> son
> d in
> y the
> ld be
> legree
> own
> rela

[9] Our conclusion then is that as between contesting bandhus of the same class and of equal degree of propinquity calculated accor ding to the mode sanctioned by Hindu law those in the nearer line exclude the more re mote Applying this conclusion to the facts before us the respondents being the descend ants of the father of the propositus are *to be* preferred to the appellants who are the descen dants of the grandfather of the propositus The result is that the appeal is dismissed with costs

R G D *Appeal dismissed*

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[illegible]

**Order.** [illegible] plaintiff in the case in the Small Cause Court [illegible] entered into an agreement with the applicant-defendant, the Hasan Academy Society, to build a wall upon a plot of ground. The plot of ground had originally been in the possession of the third party; and the applicant's case is that the plot had been taken by Government from the third party and handed over to the applicant-defendant. The plaintiff alleges that the wall was broken down and the materials taken away and hence he claims damages against the applicant on the ground that he was prevented by the applicant from carrying on the work according to the contract—in effect a case for breach of contract. The applicant has therefore obtained notice for leave to join the third party under Rule 165 of the Sind Chief Court Rules and the matter is now before me under rule 172 (1). The third party claims that the third-party application should be dismissed on the ground, first, that third-party procedure does not apply to this suit in that it was originally filed in the Small Cause Court. This point [illegible]

[illegible] that the [illegible] of this Court will apply to [illegible] Mr. Khanchand has not been [illegible] any authority in support of his [illegible] that there is [illegible] between the case of a transfer of a case from the Karachi Small Cause Court to this Court as here to and that of a Small Cause transferred by the District Judge or by a High Court under s. 24, Civil P. C., in the exercise of the general power of transfer. It appears to me that there is no analogy. The next point is that no case of indemnity can be made out upon the [illegible] by the applicant. Mr. Khanchand [illegible] that the applicant's case at the most is that the applicant has a right to damages against the defendant [illegible] and not a right to an indemnity. The mere fact that the measure of damages may be the same between the plaintiff and the applicant as between the applicant and the third party, assuming that the facts alleged by the plaintiff and the applicant are correct, does not mean that the case falls within the scope of Rule [illegible]. Mr. Hukumatrai relied upon the case in 1924 A. C. 177.[3] But that case merely lays down that a right of indemnity arises not necessarily from contract only but may arise from other relationship such as *cestui que trust* and trustee. In that case the relationship was that of Managing Director and Company; and obviously there was a preexisting fiduciary relationship which rendered the Managing Director liable to indemnify the Company. On the other hand, in the arguments in that case, there is quoted the case in (1884) 13 Q. B. D. 92.[2] This case, it appears to me, is very close in point to the present. It is true that there were not two torts as in the present case, but there were two contracts; the contract upon which the applicant relied to make the third party, whom he was trying to join, liable, was a contract that the vessel would be tight, staunch, and strong. The applicant himself was being sued for damage to the plaintiff's goods by reason of the vessel not being seaworthy. As Bowen L. J. said:

> "The mere circumstance that the damages which they may recover may probably be the same as those which may be recovered against them, does not convert either of the two contract into a contract of indemnity."

[3] Similarly Fry L. J. stated that he thought that a wide meaning should not be given to the word "indemnity" so as to include every

case in which the measure of damages is the same It is noteworthy that R. 1 of O 16A of the [illegible]

[illegible] ed to our present R 168 The application is dismissed with costs The case be fixed for issues on 20-5 1946.

V R /D H *Application dismissed*

## A I R. (34) 1947 Sind 169 [C. N. 61]

O'SULLIVAN J.

*Premji Damodar — Plaintiff* v. *L V. Govindji & Co — Defendants.*

Suit No 214 of 1945, Decided on 9-4 1946

(a) Tort — Malicious prosecution — Action for, for institution of criminal and civil proceedings— Principles applicable, stated.

Under the law of England, the principles applicable to an action for malicious prosecution for the institution of criminal proceedings are well settled The plain- [illegible]

[illegible] cused A charge which is not scandalous and which can result in a fine only, such as, for example, a prosecution for a breach of a bye-law in allowing cattle to [illegible]

The position with regard to actions for damages arising out of the inst[illegible] on a diff[illegible] actionable [illegible] reasonable [illegible] is provab[illegible] rule are in the case of proceedings for bankruptcy, liquidation arrest and execution [illegible] [Paras 11 & 12]

These principles of English Law are applicable to India, as there has been no modification by statute of the law relating to suits for damages for abuse of the process of the Court *Case law discussed* [Para 19]

(b) Tort — Damages — Remoteness of — No damages where cause of action arises out of judicial act—Issue of permanent injunction by Court—No action for damages lies.

The question whether damages are too remote is one of degree and it is very difficult to say exactly where the line is to be drawn. But in considering the question a very clear distinction has to be drawn between those cases where damages are claimed for mere malicious prosecution of a civil suit and cases in which the cause of action is said to arise out of a judicial act. No action lies against any one for acting in pursuance of a judicial order or judgment even though it is erroneous, assuming of course, that the order was not maliciously induced or procured by the suppression of facts or [illegible]

[illegible] No suit therefore, lies for recovery of damages caused by an issue of permanent injunction against the plaintiff by a Court as the cause of action in the suit is a judicial act [Para 41]

(c) Tort—Damages—Issue of permanent injunction by Court—Damages cannot be allowed on [illegible] tion of a suit [Para 45]

[illegible]

*Cases referred —*

1. (1898) 1898 A C 1: 67 L J Q B 119: 77 L T 717 46 W R 258, Allen v Flood
2. (1883) 11 Q B D 674: 52 L J Q B 488 49 L T. 249 31 W. R 668, Quartz Mill Gold Mining Co v Eyre
3. (1924) 2 K B 517: 93 L J K B 946. 131 L T 782 Harnett v Bond
4. (1921) 3 K B 560: 90 L J K B 1353 In re Polemis Furness Withy & Co
5. (1920) 1920 A C 956: 89 L J K B 705 123 L T 593, Weld Blundell v Stephens
6. (1818) 12 Q B 871, 19 L J Q B 76, Cook v Ashton
7. (1910) 2 K B 244: 79 L J K B 635 102 L T 520, Clissold v Cratchley.
8. ('15) 42 Cal [illegible]

[illegible] Ganapathi Goundan

12. ('15) 16 C L J 31 16 I C 413 [illegible] Chandra [illegible] Pal
13. ('65) 10 M I A 593 [illegible] (P. C) Mudhun Mohun Doss v. Gokul Doss
14. ('11) 14 C. L. J. 515 11 I C 723 [illegible] v A V. [illegible]
15. ('20) 21 C L J 445 7 A I R. 1920 Cal 277 [illegible]

[illegible]

19. ('71) [illegible]
20. [illegible]
21. [illegible]
22. [illegible]
23. [illegible]
24. [illegible]

[illegible]

**Order.** [illegible] Hazari [illegible] third party [illegible] the applicant [illegible] the third party [illegible] the applicant [illegible] plaintiff [illegible] damages [illegible] ground that [illegible] prevented by the applicant from carrying on [illegible] to the contract—in effect [illegible] for breach of contract. The applicant has therefore taken out notice for leave to join the third party under Rule [illegible] of the Small Cause Court Rules and the matter is now before me under rule 172 (b). The third party claims that the third party application should be dismissed on the ground, first, that third-party procedure does not apply to this suit in that it was originally filed in the Small Cause Court. This point

[illegible] that the [illegible] Court will apply to [illegible] Mr. K[illegible] transfer of a [illegible] Small Cause Court to [illegible] Small Cause [illegible] by the District Judge or by the High Court under [illegible] Civil P. C. in the exercise of [illegible] power of transfer. It appears to me [illegible] The next point is that [illegible] can be made out upon the facts [illegible] by the applicant. Mr. Khaitan [illegible] that the applicant [illegible] a right to damages [illegible] a right to [illegible] The mere fact that the measure of damages [illegible] between the plaintiff and the applicant and between the applicant and the third party, assuming that the facts alleged by the plaintiff and the applicant are correct, does not mean that the case falls within the scope of [illegible] Mr. Huk[illegible] relied upon the case [illegible] A. C. 177.[1] But that case merely lays [illegible] a right of indemnity arises not necessarily from a contract only but may arise from [illegible] trust and [illegible] In that case the relationship was that of Managing Director and Company, and obviously there was a fiduciary relationship which rendered the Managing Director liable to indemnify the Company. On the other hand, the arguments in that case, there is [illegible] (1883) 11 Q. B. D. 92.[2] This case, it appears to me, is very close in point to the present. It is true that there were not two torts in the present case, but there were two contracts, the contract upon which the applicant relied to make the third party, whom he was trying to join liable, was a contract that the vessel would be tight, staunch, and strong. The applicant himself was being sued for damages to the plaintiff's goods by reason of the vessel not being seaworthy. As Bowen L. J. said:

> "The mere circumstance that the damages which they may recover may probably be the same as those which may be recovered against them, does not convert either of the two contract into a contract of indemnity."

[3] Similarly Fry L. J. stated that he thought that a wide meaning should not be given to the word "indemnity" so as to include every

case in which the measure of damages is the same It is noteworthy that R 1 of O 16A of the Supreme Court Rules has been introduced after this case and that third party procedure is now applicable in England to a larger number of cases than under the old rule which correspond ed to our present R 168 The application is dis missed with costs The case be fixed for issues on 20 5 1946

V R /D H *Application dismissed*

**A I R. (34) 1947 Sind 169 [C N 61]**

O SULLIVAN J

*Premji Damodar — Plaintiff v L V Govindji & Co — Defendants*

Suit No 214 of 1945 Decided on 9 4 1946

(a) Tort — Malicious prosecution — Action for, for institution of criminal and civil proceedings—Principles applicable stated

Under the law of England the principles applicable to an action for malicious prosecution for the institu

can result in a fine only such as for example a pro

The position with regard to actions for damages arising out of the institution of civil proceedings stand on a different footing As a general rule it is not an actionable wrong

reasonable and

is provable The

rule are in the

ion for the institution of criminal proceedings [Paras 11 & 12]

These principles of English Law are applicable to India as there has been no modification by statute of the law relating to suits for damages for abuse of the process of the Court *Case law discussed* [Para 19]

(b) Tort — Damages — Remoteness of — No damages where cause of action arises out of judicial act—Iss

But in considering the question a very clear distinction has to be drawn between those cases where damages are claimed for mere bringing or prosecution of a civil suit and cases in which the

(c) Tort—Damages—Issue of permanent injunction by Court—Damages cannot be allowed on

orders The only exceptions are where there has been an

*Cases referred —*

1 (1898) 1898 A C 1 67 L J Q B 119 77 L T 717 46 W R 258 Allen v Flood
2 (1883) 11 Q B D 674 52 L J Q B 488 49 L T 249 31 W R 668 Quartz Mill Gold Mining Co v Eyre
3 (1924) 2 K B 517 93 L J K B 946 131 L T 782 Harnett v Bond
4 (1921) 3 K B 560 90 L J K B 1353 In re Polemis Furness Withy & Co
5 (1920) 1920 A C 956 89 L J K B 705 123 L T 593 Weld Blundell v Stephens
6 (1848) 12 Q B 871 19 L J Q B 76 Lock v Ashton
7 (1910) 2 K B 244 79 L J K B 635 102 L T 520 Clissold v Cratchley
8 ('15) 42 Cal 550 2 A I R 1915 Cal 173 26 I C

Ganapathe Goundan
12 ('15) 16 C L J 34 16 I C 443 Bhutnath Pal v Chandra Binode Pal
13 ('66) 10 M I A 563 2 Sar 202 1 Suther 644 (P C) Mudhun Mohun Doss v Gokul Doss
14 ('11) 14 C L J 515 11 I C 729 Bishun Singh v A W N Wyatt
15 ('20) 31 C L J 495 7 A I R 1920 Cal 357

19 (1871) 6 Ex 329 40 L J Ex 201 25 L T 337, Johnson v Emerson
20 ('29) 16 A I R 1929 P C 222 119 I C 600 (P C) Albert Bonnan v Imperial Tobacco Co of India Ltd
21 ('31) 61 M L J 330 18 A I R 1931 1 C 28 130 I C 310 (P C) Ramanathan Chetty v Meera Saiba
22 ('09) 3 I C 12 (Cal) Mina Kumari Bibi v Surendra Narain
23 ('22) 44 All 687 9 A I R 1922 All 465 69 I C 173 Arjun Singh v Mt Parbati
24 ('76) 1 Bom 467 Pranshankar Shivashankar v Govindlal Parbhudas

[16] With regard to the question of the remoteness of damages a very clear distinction has to be drawn between those cases where damages are claimed for the mere bringing or prosecution of a civil suit and cases in which the cause of action is said to arise out of a judicial act. No action will lie against any one for acting in pursuance of a judicial order or judgment even though it is erroneous, assuming of course that the order was not maliciously induced or procured by the suppression of facts or some form of misstatement. Various reasons may be given in support of this proposition, but it appears to me that the obvious one is that disclosed in the following observations of Scruton L. J. in the leading case in (1921) 2 K. B. 517[3], at p. 565:

"There is no doubt that the question whether damages are too remote is one of degree, and that it is very difficult to say exactly where the line is to be drawn. I refer to, without repeating at length, what I said in (1921) 3 K. B. 560,[4] at p. 576. Again there is no doubt that the action of a third party does not necessarily break the chain of causation and make subsequent damages too remote. Lord Sumner has classified some of these cases in 1920 A. C. 956.[5] *But it appears to me that when there comes in the chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance of deciding.* It was on this principle that in (1848) 12 Q. B. 871[6] it was dicided that a defendent who had wrongfully taken a person into custody and brought him before a Magistrate was not liable for the subsequent remand by the Magistrate which was a judicial act."

[17] The principles referred to above relate only to proceedings in due form of law. I would refer here to another type of action—that for trespass, the basis of which is an act done without any judicial sanction. One of the leading cases under this head is (1910) 2 K. B. 244[7], in which execution was issued in ignorance of the fact that the judgment had been fully satisfied. The cause of action was the unlawful issue of void process and not the malicious abuse of valid process. An action of this nature lies without proof of malice.

[18] It was argued by Mr. Kimatrai on behalf of the plaintiffs that the principles governing the present suit are covered by (1910) 2 K. B. 244[7] and he relied on certain Indian decisions in support of his contention. Manifestly, however, the cause of action in this case is a judicial act and Mr. Kimatrai's contention is untenable. Moreover the Indian decisions upon which Mr. Kimatrai has relied and to some of which I will later refer, proceed upon a misunderstanding of (1910) 2 K. B. 244[7].

[19] There is no doubt in my mind that the principles of English Law to which I have made reference are applicable to India, as there has been no modification by statute of the law relating to suits for damages for abuse of the process of the Court.

[20] An attempt was made by Mr. Kimatrai to suggest that since neither malice nor want of reasonable or probable cause need be established in order to obtain relief on an application under S. 95, Civil P. C., which covers cases of compensation, *for obtaining arrest, attachment or a temporary injunction,* on insufficient grounds, a suit of this nature must be decided on the analogy of S. 95, Civil P. C. I cannot accept such a contention. As was pointed out by Fletcher J., in 42 Cal. 550[8], a case on all fours with the present case:

"This section in effect takes the place of the undertaking in damages which is usually required in England from a plaintiff as a condition of a grant of an interlocutory injunction in a pending suit in his favour, except that under S. 95 the damages are limited to Rs. 1000. The history of such undertaking is given by Jessel, M. R. in (1882) 21 Ch. D. 421[9]."

[21] In (1882) 21 Ch. D. 421[9] a case in which an interlocutory injunction had been wrongly granted owing to a mistake by the Judge, without any misrepresentation, suppression or other default on the part of plaintiff, there was a difference of opinion between Jessel, M. R. and Cotton L. J. as to whether an enquiry regarding damages can be directed under the undertaking given by the plaintiff. Jessel M. R. was of the view that:

"In no case can a party be compelled under such an undertaking to pay damages because the Judge has made a mistake on a point of law? It is the duty of the Judge to decide according to law, and the plaintiff cannot be considered as undertaking to be answerable for his not doing so."

[22] No English case has been referred to in which there was a claim for damages in respect of an interlocutory injunction, apart from the undertaking and no English case cited of a claim for damages arising out of a grant of a permanent injunction. It is obvious that no such cases would ever arise in England.

[23] In A. I. R. 1944 Cal. 289,[10] at p. 296 B. K. Mukherjee J. referring to a similar contention to that put forward by Mr. Kimatrai relating to section 95, said:

"It may by true, as Mr. Das contends, that for the purpose of getting a relief under S. 95, Civil P. C., no malice or want of reasonable and probable cause need be proved; but we agree with the view taken by the Madras High Court in *35 Mad. 598,*[11] *that there* is no reason for holding that the section in any way interferes with the principles regulating suits for damages for abuse of the processes of the Court. The section allows a limited remedy without proof of malice which is open to a party to avail himself of, if he chooses, but if he is not satisfied with this summary remedy and files a suit for compensation in the regular way, he must prove the essential ingredients of a malicious abuse of the Court's process."

in these cases, that a distinction is to be drawn between a suit for damages alleged to arise in consequence of a judicial order and a suit for damages in which the cause of action is the mere bringing of the suit or other proceeding and he has emphasised that there can be no cause of action based on a judicial order.

[36] There was an appeal to the Privy Council against the decision of Rankin C. J. and Ghose J. reported in A. I. R. 1929 P. C. 222.[20] The appeal proceeded, however, principally, on grounds other than those covered by the decision in the High Court and there was no discussion as to the circumstances under which a party is entitled to succeed in a case of this nature. Sir George Lowndes, delivering the judgment of the Board, said :

"Their Lordships having come to this conclusion, it is not material for them to consider what other conditions may be necessary to enable a plaintiff to succeed in a suit of this nature. There was much discussion in India, and some also before this Board, as to this principle to be deduced from the judgments in (1883) 11 Q. B. D. 674.[2] Their Lordships, however, make no pronouncement upon this aspect of the case, which may require further consideration on some future occasion."

[37] 16 C. L. J. 34[12] was again dissented from in A. I. R. 1944 Cal. 289[10] already referred to above in relation to S. 95, Civil P. C. Mukerjee J. pointed out that in 16 C. L. J. 34:[12]

"the act was an act of the Court and there was no detention or seizure of plaintiff's property."

[38] He also referred to the decision of the Privy Council in 61 M. L. J. 330[21] and emphasized the distinction between malicious arrest or abuse of execution proceedings on the one hand and falseimprisonment or unlawful seizure or attachment of the plaintiff's property on the other. In the first place the defendant acts under the orders or authority of the Court and the foundation of the action is a malicious procuring of the order of the Court by representation of facts which the defendant knew to be false or for which there was no reasonable or probable basis. In the other class of cases the act is an act of the defendant himself or of a ministerial officer of the Court and even if there is an order of the Court behind it, it is void for want of jurisdiction.

[39] Before passing on to certain decisions of the other High Courts in India, I would refer to an old decision of the Calcutta High Court on the point that there is no cause of action for damages arising from a judicial order. The case is 3 C. 12.[23] It was a suit for damages alleged to arise in consequence of an order of attachment made by a Magistrate under S. 146, Criminal P. C. at the instance of the defendant. I set out the following observations in the judgment:

"As regards the *first point taken on behalf of the appellant, it is manifestly well founded on principle and is supported by weighty authorities. Let it be assumed for a moment that the order of the Magistrate under S. 146, Criminal P. C.,* was *erroneous on the merits. It does not follow.* by any means that *any responsibility can be fastened upon the first defendant in respect thereof. It is well-settled that no action will lie against any person for procuring an erroneous decision of a Court of Justice.* This is so, even though the Court has no jurisdiction in the matter and although its *judgment or order* is for that or any other *reason invalid.* A Court of Justice is not the agent or servant of the litigant who sets it in motion so as to make that litigant responsible for the errors of law or fact which the Court commits. Every party is entitled to rely absolutely on the presumption that the Court will observe the limits of its own jurisdiction and decide correctly on the facts and law. In support of this statement of the law, it is sufficient to refer to the leading decision in (1848) 12 Q. B. 871.[6] In that case, the defendant had wrongly though honestly arrested the plaintiff and charged him with an offence before a Magistrate who thereupon remanded him to custody. It was ruled that the original arrest inasmuch as it was his own wrongful act, he was not responsible for the subsequent remand which was merely erroneous act of the Magistrate."

[40] Another decision relied upon by Mr. Kimatrai is 44 ALL. 687[23]. The facts were that one Ganga Prasad died leaving a widow Mt. Parbati. One Arjun Singh set up a claim to be his adopted son, this claim being resisted by Parbati. Mt. Parbati and Arjun Singh then referred their dispute to arbitration and the arbitrator made an award by which, inter alia, half of the debts of the deceased were awarded to each party and Mt. Parbati was in addition given a life interest in her husband's property. Disregarding the award, Arjun Singh instituted a suit against Mt. Parbati for a declaration that the award was void and, that being the adopted son of the deceased Ganga Prasad he was entitled to the latter's whole property. The suit was decreed by the Subordinate Judge in favour of Arjun Singh but on appeal to the High Court the decree was reversed and the award held to be good and binding. Mt. Parbati then instituted against Arjun Singh a suit for damages alleged to have been sustained by her in consequence of Arjun Singh's decree which while it existed had precluded her from realising certain funds, claims in respect of which became time-barred. She obtained relief to a modified extent in the Courts below, and Arjun Singh then appealed to the High Court on the ground that Mt. Parbati's suit did not lie. The High Court decided that the suit was sustainable and the appeal was dismissed. They declined to follow 42 Cal. 550[8] and held that the suit did not fall within the general rule of exemption referred to by Bowen L. J. in (1883) 11 Q. B. D. 674[2]. The learned Judges, Stuart and Kanhaiya Lal. JJ. were of the view that the bringing of the action by Arjun Singh involved